# Petition

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No.

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# SUPREME COURT OF THE UNITED STATES

October Term, 1981

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**LLOYD FLETCHER**, Superintendent,
Bell County Forestry Camp - - - Petitioner

*versus*

**ERIC WEIR** - - - - - - - Respondent

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT WITH APPENDIX

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The petitioner prays that a writ of certiorari issue to review the appellate opinion of the United States Court of Appeals for the Sixth Circuit rendered September 9, 1981.

## THE QUESTION PRESENTED FOR REVIEW

I. **Did the Court of Appeals for the Sixth Circuit Commit Reversible Error When in the Course of Affirming the Issuance of the Writ of Habeas Corpus It Held That this Court's Opinion in *Doyle* v. *Ohio*, 426 U. S. 610 (1976) Was Applicable to a Situation Where the Respondent Had Been Arrested But Had Not Been Given a *Miranda* Warning.**

II. **Did the Court of Appeals for the Sixth Circuit Commit Reversible Error in Holding That the Improper Cross-examination Conducted by the State Trial Prosecutor Was Not Harmless Beyond a Reasonable Doubt in a Situation Where the Questions Were Fleeting and the Evidence of Guilt Was Overwhelming.**

## PARTIES TO THE PROCEEDING

All the parties to this Proceeding are set forth in the caption of the case before this Court.

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# SUPREME COURT OF THE UNITED STATES

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LLOYD FLETCHER, Superintendent,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT WITH APPENDIX

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed on September 9, 1981 (Judge Engel dissenting). The split opinion affirmed the Judgment of the United States District Court for the Western District of Kentucky sitting at Paducah which on December 7, 1979 granted the respondent's petition for a writ of habeas corpus. Copies of this opinion may be found at Appendix p. 27.

The United States Magistrate's Findings of Facts, Conclusions of Law and Recommendations which was accepted in whole by District Court may be found at

Appendix p. 53. Finally, the Memorandum Opinion Per Curiam of the Kentucky Supreme Court which affirmed the state district court judgment may be found at Appendix p. 64.

## STATEMENT OF JURISDICTION

The filing date of the appellate opinion (to be published) of the United States Court of Appeals for the Sixth Circuit from which a review by this Court is sought is September 9, 1981. Under Rule 12 of the Supreme Court Rules this petition for a writ of certiorari is timely filed.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion in question by 28 U.S.C. Section 1254(1).

This Court should grant this petition for writ of certiorari due to the fact that there exists special and important reasons under both Rule 17.1(a) and Rule 17.1(c). The opinion below is in sharp conflict with the opinions of the Court of Appeals for the Second, Third, Fourth, Fifth and Ninth Circuits. In addition the opinion as rendered by the Court of Appeals for the Sixth Circuit conflicts with other opinions issued by that same court.

In accordance with Rule 17.1(c) the petitioner submits that opinion of the court below conflicts with the opinions of this court as decided in *Doyle* v. *Ohio,* 426 U. S. 610 (1976), *United States* v. *Hale,* 472 U. S. 171 (1975), *Jenkins* v. *Anderson,* 447 U. S. 231 (1980) and *Anderson* v. *Charles,* 447 U. S. 104 (1980).

In light of the foregoing assertions, the petitioner urges this Court to grant the application for a writ of certiorari and review the opinion of the United States Court of Appeals for the Sixth Circuit.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional foundation for the opinion below is predicated upon the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the judgment of the United States District Court, Western District of Kentucky, at Paducah, which ordered the issuance of a writ of habeas corpus to the respondent, Eric "Moose" Weir. In its order and judgment, the district court, after conducting a *de novo* review of the Magistrate's findings of fact and conclusions of law, held that the writ was granted with the condition that a state trial date be set within sixty days and that trial be held within sixty days. Joint Appendix, hereinafter designated as J.A., 146-147.[1] On January 7, 1980, the respondent-appellant filed a timely notice of appeal and motion for stay. On January 14, 1980, the district court granted the respondent's motion. The appeal was fully briefed by both parties and the court below entertained oral arguments on August 14, 1980. After more than a year from the date of the oral argument the court below rendered its published opinion in which Judge Lambros[2] concurred and Judge Engel dissented. As will later be discussed in the argument portion of

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[1]The designation of the Joint Appendix is in reference to the appendix that was filed in the Sixth Circuit and which is not presently before this Court.

[2]Hon. Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

this petition the Court of Appeals held that this court's opinion in *Doyle* v. *Ohio, supra,* was applicable to a fact pattern where the respondent had been arrested but not given a warning of rights in accordance with *Miranda* v. *Arizona,* 384 U. S. 436 (1966). The court thus agreed with the district court's conclusions that the cross-examination of Weir in which the prosecutor impeached the testimony of the accused with evidence of his post-arrest silence constituted a violation of his right to remain silent. A. —.[3] The court below also held that the error could not be construed as harmless beyond a doubt.

On October 12, 1977, Eric Weir, the respondent herein, was indicted in the McCracken Circuit Court for the murder of Ronald Buchanan in violation of KRS 507.020. On October 27, 1977, respondent was arraigned and entered a plea of not guilty. Weir's trial was held on February 21-23, 1978. It is important to note that there were several eyewitnesses to the fight which resulted in Ronnie Buchanan's death. All of the witnesses testified that Weir and Buchanan were engaged in a fight and that Weir was being held upside down by Buchanan. Buchanan suddenly broke away and said that he had been stabbed. J.A., 1, 4-5, 8-12, 15, 17, 20. At trial, Eric Weir admitted to stabbing Buchanan but claimed that it was either an accident or done in self-defense. J.A. 38-39, 44. Kenneth Turner, however, testified that Weir was the aggressor and had

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[3]The designation of A. is in reference to the Appendix that follows the main body of this petition.

attacked Buchanan. J.A. 12. Linda Buchanan testified that Weir said, after Buchanan was stabbed, that he was going to cut him [Buchanan] some more. J.A. 1.

During the course of the cross-examination the prosecutor questioned Weir as to why he immediately fled the scene of the fight and why it took him nearly seventeen hours to get home.[4]

At the close of all the evidence the trial court instructed the jury as to murder resulting from the wanton disregard for human life, first and second degree manslaughter, and reckless homicide. T.E. 354-357. In addition, the court instructed as to self-protection and defined the terms "intention," "wanton," "recklessly" and "serious physical injury." After deliberation, the jury returned a verdict of first degree manslaughter and sentenced Weir to a term of twenty years.

Additional facts will be presented as they are needed during the course of the arguments in support of the petitioner's request for a writ of certiorari.

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[4]It was during this cross-examination that the alleged impermissible cross-examination occurred. J.A. 51-52, 58-60. The circumstances surrounding this incident are summarized in detail in Argument I, *infra*.

## ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I.

**The Court of Appeals for the Sixth Circuit Committed Reversible Error When in the Course of Affirming the Issuance of the Writ of Habeas Corpus It Held That This Court's Opinion in *Doyle* v. *Ohio*, 426 U. S. 610 (1976) Was Applicable to a Situation Where the Respondent Had Been Arrested But Had Not Been Given a *Miranda* Warning.**

This case raises the constitutionally significant question of whether a state prosecutor can impeach the testimony of an accused on the basis of his silence at the time of arrest but prior to the administration of his *Miranda* rights.[5] Although the scope of impeachment as to pre-arrest and post-arrest silence seems to be well defined, see *Jenkins* v. *Anderson*, 447 U. S. 231 (1980) and *Anderson* v. *Charles*, 447 U. S. 404 (1980), the various circuit courts of appeals are in considerable disarray as whether this court's opinion in *Doyle* v. *Ohio*, 426 U. S. 610 (1976) is applicable in a situation where the inculpatory silence occurs at the time of arrest but a custodial interrogation and administering of a Miranda warning has not yet occurred.[6]

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[5] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

[6] In examining the record, it is not altogether clear whether respondent was ever given a Miranda type warning. In his brief before the court below the petitioner suggested that the case should be remanded for an evidentiary hearing. The appellate court rejected that suggestion by commenting that since it was the arrest and not the administration of the Miranda warning that was critical, an evidentiary hearing was not needed. See A. at p. 34 Fn. 8.

In its significant opinion of September 9, 1981, the United States Court of Appeals for the Sixth Circuit held that the petitioner's Fifth and Fourteenth Amendment rights were violated when the prosecutor inquired of Weir during cross-examination as to the reason for his failure to tell the arresting officers at the time of the arrest that the death of the victim was accidental in nature and not deliberate. In explaining its holding the court noted that the natural fear and anxiety occurring at that moment of confrontation with the police officer will lead a defendant whether innocent or guilty to silence. A. p. 37. As the court below put it:

> Arrest changes things. The fact that one has been arrested is significant and should make a difference. A. p. 37.

The Court also indicated contrary to the assumption made by this court in *Miranda* v. *Ariz., supra,* that a person accused of a crime is cognizant enough of his rights to remain silent. As the Sixth Circuit noted:

> There is a second important reason not to permit post-arrest silence to be used as impeachment. There is widespread knowledge in society that one who is arrested has no obligation to speak to the police and that he is entitled to consult with an attorney. The news media has widely publicized the *Miranda* case and its formal warnings requirement. Simply stated, many if not most persons under arrest know of their right to remain silent and exercise that right. In fact, many lawyers give out the routine advice to their clients that if the client should be arrested for any reason, the client should say nothing and call the attorney.

> We do not think that persons who are exercising their right to remain silent should be penalized for it.
>
> *Jenkins* and *Doyle* thought it unfair to impeach by use of silence where "governmental action induced petitioner to remain silent." *Jenkins, supra,* 100 S. Ct. at 2130. *We think that an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent.* When one combines a suspect's fears and anxieties upon arrest with widespread knowledge of one's right to remain silent, the result is often just that—silence. Given these realities, we think it is fundamentally unfair to allow impeachment through the use of any post-arrest silence. A. pp. 37-38 (Emphasis added)

Finally, the appellate court resolved this question on the basis of policy considerations. The Sixth Circuit commented that if it were to hold that such silence was available for impeachment purposes it would: (1) penalize the knowledgeable defendant, and (2) discourage the reading of the *Miranda* warning.

Based upon these considerations, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court which found that respondent's constitutional rights had been violated. This opinion conflicts with the decisions of this court and the various circuit courts of appeal. The balance of this argument will be devoted to illustrating the nature of that conflict. See Rule 17.1(c).

As a starting point, the context for this alleged impropriety must first be examined.

On direct examination respondent Weir testified that the knife that he got out during the fight was in a pouch on his side. J.A. 42. Weir said that he didn't have the knife anymore and speculated that as he unlocked the truck he must have laid it on top and that it slipped off. J.A. 42. After this statement, Weir testified that as he was getting the knife out and was trying to open it, Buchanan, the victim, fell on him and pinned him. It was at this time that Buchanan was stabbed. J.A. 43-44.

On cross-examination, the Commonwealth's Attorney initially questioned Weir as to his statements that he was on the losing end of the fight. Weir admitted that he was not badly hurt. J.A. 45-50. This exchange established the foundation for the questions pertaining to how, if Weir was so badly hurt, he could open a jack-knife. The following colloquy occurred:

> "Q. Now, Weir, after this happened, your defense intrigues me, really. It's very interesting to me. After it happened, if this is the way it happened, why didn't you go to the Police Department?
>
> A. I didn't know, really, how bad he was hurt, or if he was hurt very bad at all. I didn't really know.
>
> Q. All right, so he wasn't hurt very badly, why didn't you go to the Police Department?
>
> A. Why didn't anybody else go to the Police Department? Why didn't everybody out there go to the Police Department?

Q. They did go to the Police Department, but you didn't go.

A. No." J.A. 51-52.

No objection was made by counsel.

The Commonwealth's Attorney returned to his theme concerning Weir's self-defense by asking Weir whether he was afraid of anyone. J.A. 56. At this point counsel objected and the court gave an admonishment. J.A. 56. The Commonwealth's Attorney proceeded to inquire about the altercation which occurred between Weir and Kenneth Turner.[7] J.A. 57. The following exchange occurred:

"Q. Now, let's go back to this Turner thing. Why, when you came outside, did you tell him to just come on? Were you ready for another fight?

A. No, sir. I didn't know what to say or what to do, because like I say that worked he went away. I mean—

Q. You had a knife, didn't you?

A. No, sir, I didn't at the time, but I didn't realize it, but—

Q. Let me ask you about that knife disappearing like it did. Where did you say you put it?

A. It was evidently on the tool box on the back of the truck.

Q. What did you put it there? Why didn't you put it back in the pouch?

A. Well, I was kind of shook up.

Q. Now, you say you took the keys out and unlocked the car; is that right?

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[7]Previously Turner had testified that Weir returned to the bar, got out of his truck, and threatened him. J.A. 11.

A. Yes, sir.

Q. Why didn't you put your knife back in the pouch, if you didn't?

A. I don't know. I just laid it on the truck evidently; it was gone.

Q. Do you remember that now, or did somebody say that?

A. I distinctly remember laying it up there trying to find the keys.

Q. The next day when the State Police came to your house and searched it, why didn't you just tell them that I lost it?

A. I don't know.

* * *

By Mr. Bryant:

Q. Why didn't you tell the State Police where the knife was?

A. I don't guess they even asked me.

Q. Well, you didn't offer it; did you?

A. No.

Q. Why didn't you tell them at the time that he accidentaly fell down on your knife?

A. Well, I didn't—

Mr. Osborne: Judge, again, I am going to object. He had no reason to tell them anything at the time.

The Court: He can ask him, Mr. Osborne, it's overruled.

Mr. Osborne: All right.

By Mr. Bryant:

Q. Go ahead and tell us.

A. I didn't feel I ought to tell them anything.

Q. Okay. That's after your knife disappeared and after you fled all over Ballard County, Barlow,

and Wickliffe; and 17 hours later you were picked up. You don't want to tell us about anything? Of course, you don't have to.

Mr. Osborne: Again, I'm going to object to that and move this Court to discharge this Jury in this case because of the conduct on cross-examination.

The Court: Overruled." J.A. 57-60.[8]

In *Doyle* v. *Ohio, supra,* this Court quoted *United States* v. *Hale,* 422 U. S. 171 (1975), the federal counterpart to *Doyle,* as follows:

" '[W]hen a person under arrest *is informed, as Miranda requires, that he may remain silent,* that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, *as he was told he need not do,* an unfavorable inference might be drawn as to the truth of his trial testimony. . . .

Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would

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[8]The court below noted that the prosecutor could properly ask Weir about his failure to go to the police during the seventeen hour hiatus. A. at p. 34. The Sixth Circuit condemned those questions posed by the prosecutor as to why Weir did not voluntarily tell the police he lost the knife and that the killing was an accident. A. pp. 36-37.

> not be the case.' " *Doyle* v. *Ohio* at 619. Emphasis added.

This Court in *Doyle* went on to hold:

> "We hold that the use for impeachment purposes of petitioners' silence, *at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment.* The State has not claimed that such use in the circumstances of this case might have been harmless error. Accordingly, petitioners' convictions are reversed and their causes remanded to the state courts for further proceedings not inconsistent with this opinion." Id. at 619-620. (Emphasis added.)

It is obvious from the decision that necessary prerequisites for an error are (1) an arrest, *and* (2) the administration of the *Miranda* warning. In this case, Trooper Stevens expressly disavowed arresting Weir and stated instead that Weir was taken into custody.

That the administering of the *Miranda* warning is a prerequisite is apparent in light of the underlying rationale for the basis of the constitutional error. A discussion of the underlying authority of *Doyle* would be helpful at this point.

At common law, a hearsay exception existed that allowed the prosecution to show that the accused was silent in the presence of accusatory statements which ordinarily would be rebutted by the accused if he were truly innocent. *Fowle* v. *United States,* 410 F. 2d 48 (9th Cir. 1969), recognized this rule, as did *United*

*States* v. *Coppola*, 526 F. 2d 764 (10th Cir. 1975). See also *United States* v. *Moore*, 522 F. 2d 1068 (9th Cir. 1975). The impact of the *Miranda* warnings and the constitutional right to remain silent created confusion as to when the prosecutor may properly show the silence of an accused. Some of the Federal Circuit Courts of Appeals took the position that any reference to defendant's silence was prejudicial. *United States* v. *McKinney*, 379 F. 2d 259 (6th Cir. 1967). Other Circuit Courts acknowledged that exceptions existed and, under certain circumstances, the fact that the accused was silent could be admitted to impeach his credibility or to show the inconsistency of his actions. *Fowle* v. *United States, supra.*

In 1975 this Court in *United States* v. *Hale*, 422 U. S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99, undertook the task of resolving this conflict. The Supreme Court concluded that the administration of the *Miranda* rights rendered a defendant's silence at the time of arrest ambiguous and thus the validity of the hearsay exception was nullified to a certain extent. In view of the significant prejudice that could arise from this particular impeachment tactic, this Court held:

> "As we have stated before: 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.' Shepard v. United States, 290 U. S. 96, 104, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any

reference to his silence under such circumstances carried with it an intolerably prejudicial impact.

"Accordingly, we hold that under the circumstances of this case it was prejudicial error for the trial court to permit cross-examination of respondent concerning his silence during police interrogation, and we conclude, in the exercise of our supervisory authority over the lower federal courts, that Hale is entitled to a new trial." *United States* v. *Hale, supra,* at 180-181.

This Court however specifically left open the question of whether the error violated a defendant's constitutional rights. *Doyle* v. *Ohio, supra,* of course, concluded that cross-examination as to a defendant's post-arrest silence ran afoul of the constitutional protection afforded in *Miranda.* As such, *Doyle* v. *Ohio* was a natural culmination of *Hale, supra.* and the Court specifically acknowledged that it was answering the question left open in *Hale.*

As can be seen from the *Hale* and *Doyle* decisions, it is error of a constitutional magnitude for the prosecutor to inquire of the accused as to his reasons for remaining silent. Presumably, the right to remain silent and requirement of reversal attaches upon the giving of the *Miranda* warnings. *Doyle, supra.* It is also understood, however, that where the accused actually was not silent, the prosecutor may use his statements to impeach the credibility of his in-court testimony. *United States* v. *Conlin,* 551 F. 2d 534 (2nd Cir. 1977); *Mishler* v. *Commonwealth,* Ky., 556 S. W. 2d 676 (1977).

Recently in *Anderson* v. *Charles, supra,* and *Jenkins* v. *Anderson, supra,* this Court further refined its holding in *Doyle* v. *Ohio, supra,* by deciding that *Doyle* did not apply to silence that occurred prior to arrest and further that *Doyle* was not applicable to cross-examination as to inconsistent statements even though the inconsistency was arguably based on the silence of the accused.

It is important to note that this Court appeared to be of the opinion that the prophylactic holding in Doyle was triggered only when the accused was informed that he had the right to remain silent. Thus the question that is in urgent need of resolution is whether it is the arrest standing alone and not the *Miranda* warning that constitutes the compulsion to remain silent and thus renders the defendant's silence insoluably ambiguous. See *Doyle* v. *Ohio.* This Court has never had an opportunity to address this question.[9]

The respondent submits that the court below misunderstood the nature of the protection afforded by

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[9]This exact question was raised in both *Michigan* v. *Hurd,* 102 Mich. App. 424 (1980), and *People* v. *Conyers,* 400 N. Ed. 2d 342, 49 N. Y. 2d 174, 424 N.Y.S. 2d 402 (1980). In both cases this court on petition for certiorari granted this request, vacated the judgment of the appellate court and remanded the question for further consideration in light of *Jenkins. Michigan* v. *Hurd,* ____ U. S. ____, 50 U.S.L.W. 3244 (1981); *People* v. *Conyers,* ____ U. S. ____, 101 S. Ct. 56 (1981). On remand the New York Court of Appeals stated that as a matter of state law impeachment on the basis of silence during arrest constituted a violation of the New York Constitution and rules of evidence. See *People* v. *Conyers,* 420 N. E. 2d 933 (N.Y. 1981). The existence of this independent state ground, of course, bars any review by this Court.

*Doyle* v. *Ohio.* In *Doyle,* this Court did not enunciate a novel constitutional principle. Rather this Court in *Doyle* addressed the pragmatic question of whether the concept of admission by silence had any validity once the accused was informed by the government that he had a right to remain silent. The keystone of the *Doyle* case was one of essential fairness. The prosecution should not be permitted to turn a shield into a sword. This Court however has never held that silence in face of an accusation could never be used as an impeachment tool. In fact this Court has said just the opposite. See *Jenkins* v. *Anderson, supra, Grunewald* v. *United States,* 353 U. S. 391 (1957) and *Raffel* v. *United States,* 271 U. S. 494 (1926). Unfortunately the various circuit courts of appeal have expanded *Doyle* to enhance any incident of silence that might arguably be protected by the Fifth Amendment. See for example *U. S. ex rel Allen* v. *Rowe,* 591 F. 2d 391 (7th Cir. 1979), *vacated and remanded* in *Franzen* v. *Allen,* 100 S. Ct. 3006 (1980), *Charles* v. *Anderson,* 610 F. 2d 417 (6th Cir. 1979), *reversed, Anderson* v. *Charles, supra, Henagen* v. *Anderson,* 500 F. Supp. 641 (E. D. Mich. 1980), *United States* v. *Harrington,* 636 F. 2d 1182 (9th Cir. 1980).

A number of cases, however, have stated that the protection afforded by *Doyle* is of limited application and is available only when it is apparent that silence of accused has been rendered insoluably ambiguous by the fact that the accused has been told he can remain silent. *Grieco* v. *Hall,* 641 F. 2d 1029 (1st Cir. 1981), and *United States* v. *Caro,* 637 F. 2d 869 (2nd Cir.

1981). An examination of these opinions however clearly reflects the existence of a conflict as to whether confrontation by the accused with the government is sufficient to trigger the protection afforded under *Doyle*.

In the three appellate cases that have directly considered this question the courts have been unable to agree as to exact boundaries of the *Doyle* opinion. See *People* v. *Conyers, supra,* Judge Meyer dissenting, *Michigan* v. *Hurd* (dissent noted but not published) and *Weir* v. *Fletcher* (Judge Engel dissenting.). It is obvious that this Court needs to resolve this important principle of constitutional law and lay out the boundaries of *Doyle* v. *Ohio*. In other words the question left open in *Jenkins* v. *Anderson* is now ripe for resolution.

In conclusion, it is clear that not all governmentally imposed choices will violate the defendant's Fifth Amendment right to remain silent. *Crampton* v. *Ohio,* 402 U. S. 183 (1971). *Chaffin* v. *Stynchombe,* 412 U. S. 17 (1973). Silence at the time of arrest can be a highly significant source of impeachment and should be available unless it is clear that the basis for the silence is predicated upon the accused being told that he has the right to remain silent. Since this question is important to the effective administration of criminal justice, the petitioner respectfully requests that its application for a writ of certiorari be granted.

## ARGUMENT

### II.

**The Court of Appeals for the Sixth Circuit Committed Reversible Error in Holding That the Improper Cross-examination Conducted by the State Trial Prosecutor Was Not Harmless Beyond a Reasonable Doubt in a Situation Where the Questions Were Fleeting and the Evidence of Guilt Was Overwhelming.**

In holding that the impeachment of Eric Weir's testimony on the basis of his silence during arrest was not harmless beyond a reasonable doubt the court below said:

> IV. Harmless Error
>
> The state has a *good* argument that the improper use of post-arrest silence in this case was harmless beyond a reasonable doubt. The unlawful prosecutorial inquiry into Weir's post-arrest silence was not prolonged or emphasized. In addition, the questions paralleled questions the prosecutor properly asked about Weir's pre-arrest silence. The issue of harmless error in *Doyle* v. *Ohio* situations has come up often. We refer the reader to *Williams* v. *Zahradnick*, 632 F. 2d 353, 360-65 (4th Cir. 1980) (citing numerous cases) for an extensive discussion of this question.
>
> In this case, we conclude that the error was not harmless beyond a reasonable doubt. We are dealing with a fight which ended in a stabbing. As can be expected, the witness' testimony is con-

> flicting. The jury convicted Weir not of murder, but of first degree manslaughter.
>
> Courts should be cautious in applying the harmless error doctrine. *See Eberhardt* v. *Bordenkircher,* 605 F. 2d 275, 278-80 (6th Cir. 1979). In this case, although the error was not pronounced, it may well have affected the jury's decision. The circumstances surrounding the fight and subsequent stabbing were very muddled at trial. A jury plays a particularly important fact-finding role in cases like this. A jury should have an opportunity to determine Wier's culpability without the taint of constitutional error. We conclude that the error was not harmless beyond a reasonable doubt. A. pp. 41-42 . Emphasis added.

As to the application of the harmless error test, by the Court of Appeals, the respondent submits that the court below in *Eberhardt* v. *Bordenkircher,* has formulated too strict a test and thus is the conflict with this Court's opinion in *Harrington* v. *California,* 395 U. S. 23 (1969) and *Chapman* v. *California,* 386 U. S. 18 (1967).

Since the formulation of the harmless error rule by this Court the various circuit courts of appeals have developed conflicting and confusing tests as to the factual circumstances that will render a so-called *Doyle* issue harmless. Compare *United States* v. *Meneses-Devile,* 580 F. 2d 1068 (5th Cir. 1977), *United States* v. *Harrington,* 636 F. 2d 1182 (9th Cir. 1980), *Williams* v. *Zahradnick,* 632 F. 2d 353 (4th Cir. 1980), *Eberhardt* v. *Bordenkircher, supra, United States* v. *Luna,*

539 F. 2d 417 (5th Cir. 1976). Of the various tests the standard presently in vogue in the court below appears to be the most rigid.

Simply put, the error was clearly harmless beyond a reasonable doubt. The petitioner believes the following factors to be important:

(1) *Impeachment did not focus on self-defense.*

Much of the allegedly improper cross-examination was focused on Weir's statement that he had lost his knife. Quite frankly, the credibility of this story did not necessarily have any relevance as to Weir's assertion that Buchanan was stabbed when he fell on Weir's knife.

(2) *Weir's alleged silence was properly brought to the jury's attention.*

On three occasions during the cross-examination of Owen Beckham, Vicki Weir, and Debby Beckham, it was acknowledged that Weir did not claim that the stabbing was an accident or was in self-defense. J.A. 74, 76-77, 78-79.

(3) *The question was fleeting.*

The question was asked on two occasions. The prosecutor did not dwell on the point and did not tell the jury that Weir's post-arrest silence could be used as impeachment.

(4) *The evidence was overwhelming.*

In this case the evidence was direct and not circumstantial. Four eyewitnesses saw the incident and all four testified that Buchanan was stabbed, that Weir folded up his knift, and immediately left the scene, pausing only to pick up

> his wife's purse. Furthermore, Weir admitted to the stabbing and directly claimed accident.[10]

When the evidence is viewed as a whole, it is clear that the prosecutor was attempting to impeach Weir's claim of accident by pointing to the inconsistency of Weir's actions immediately following the incident. For some seventeen hours, before he was taken into custody, Weir and his friends traveled to several places. During this entire period of time Weir never asserted that the stabbing was an accident or committed as an act of self-defense. Although he asserted at trial that he was badly hurt, he never sought medical attention. The prosecutor had a right to demonstrate the inconsistency of these actions. As was pointed out by the court below this evidence was properly admitted. A. p. 34. Unfortunately during the course of the fray, one or possibly two improper questions were asked. In context, the questions were innocuous. Furthermore, they were not focused at the heart of the defense.

The situation at the bar is similar to the one presented in *Stone* v. *Estelle,* 556 F. 2d 1242 (5th Cir. 1977). In *Stone,* the defendant testified that when he was arrested he was on his way to the police station to surrender. By inference he indicated that he had cooperated with the police. His defense at trial was self-defense. In an effort to rebut this inference of cooperation, the prosecutor rhetorically argued in cross-argu-

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[10]Weir never directly stated that he acted in self-defense. The instruction on self-protection was based on an inference arising from Weir's statement that he was hurt pretty bad. J.A. 38.

ment as to why he didn't volunteer this story when he was first arrested. In holding this statement to be harmless, the Fifth Circuit said:

> "In the present case, Stone's version of the shooting was not the subject of the impeachment inquiry. Rather, the prosecutor was attempting to challenge only the proposition that Stone had been cooperative with the police. Of course, the question of Stone's cooperativeness may have affected his credibility to the jury, but it had no bearing on his claim of self-defense, which was his exculpatory story.
>
> ". . . Here the issue of Stone's cooperativeness was not essential to his defense; indeed, it was unrelated to the crime charged and to Stone's story pertaining thereto. And its seed had been planted not by defendant but by the prosecutor. Therefore, the *Doyle* rule is inapplicable.
>
> ". . . Even in cases where it was held that a *Doyle* problem resulted in reversible error, there has sometimes been reference made to the fact that error therein was not harmless because the evidence was not overwhelming. [Citations omitted.]
>
> "This is not such a case. We are presented here with overwhelming evidence of guilt. Stone himself admitted to shooting his gun in Cornish's direction. We note also that the disputed prosecutorial remarks were very brief in the context of the entire trial and, as indicated earlier, did not reflect on Stone's innocence or even on his exculpatory story: the comments went to the question of his cooperativeness which had nothing to

> do with the case against him. In other words, they 'did not have an intolerably "prejudicial impact," [citation omitted] in these circumstances,' " *Stone* v. *Estelle, supra,* at 1245-1246.

In this case, the evidence was admittedly overwhelming, the question was directed towards inconsistent conduct and did not strike at the jugular of the petitioner's defense. Under these circumstances, the error was harmless beyond a reasonable doubt. See *Chapman* v. *California, supra.*

Despite the presence of these factors the court below held that the error was not harmless. In light of the conflict throughout the circuits as to the application of the harmless error rule in a *Doyle* type situation, the petitioner respectfully submits that this Court should grant the petitioner's application for certiorari.

## CONCLUSION

For the reasons set forth in the above styled arguments, the petitioner respectfully prays that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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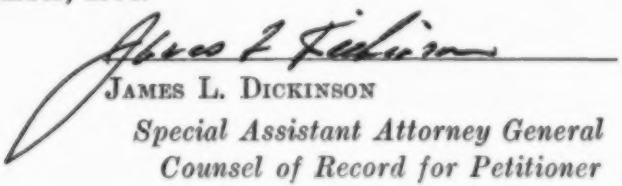
**PROOF OF SERVICE**

I, James L. Dickinson, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, first class postage prepaid, to Hon. Donna Proctor, Assistant Public Advocate, State Office Building Annex, Frankfort, Ky. 40601, counsel for respondent, and that all parties required to be served have been served, this 7th day of December, 1981.



JAMES L. DICKINSON
*Special Assistant Attorney General*
*Counsel of Record for Petitioner*

# Appendix

No. 80-3093

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

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ERIC WEIR, - - - - - *Petitioner-Appellee,*

*v.*

LLOYD FLETCHER, Superintendent, Bell County Forestry Camp, - - - *Respondent-Appellant.*

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Appeal from the United States District Court for the Western District of Kentucky.

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**OPINION**—Decided and Filed September 9, 1981.

Before: ENGEL and KEITH, Circuit Judges, and LAMBROS, District Judge.*

KEITH, Circuit Judge, delivered the opinion of the Court. LAMBROS, District Judge (p. 14), delivered a separate concurring opinion and ENGEL, Circuit Judge (pp. 15-22), delivered a dissenting opinion.

KEITH, Circuit Judge. The Commonwealth of Kentucky appeals from the district court's granting of a writ of habeas corpus. Petitioner Eric Weir took the stand in his own defense at his murder trial in state court. The prosecutor cross-examined him and made comments to the jury concerning Weir's silence after he was arrested but before he was given *Miranda* warnings. The district court concluded that the state had violated Weir's Fifth Amendment

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*Hon. Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Rights, as outlined in *Doyle* v. *Ohio*, 426 U. S. 610 (1976). Accordingly, the district court granted Weir's petition for a writ of habeas corpus. We agree, and affirm Judge Johnstone's decision.[1]

## FACTS

Petitioner Eric Weir was convicted in Kentucky state court of first degree manslaughter in the stabbing death of Ronnie Buchanan. The stabbing occurred during a fight in the parking lot of a night club in McCracken County, Kentucky.

While the evidence is not clear as to the cause of the fight, all witnesses agreed that during the course of the fight Buchanan pinned Weir to the ground.[2] Suddenly Buchanan jumped to his feet shouting that he had been stabbed. Weir immediately left the scene with his wife, returned momentarily to pick up a friend, and thereafter

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[1]The state raises a threshold objection. The state argues that Weir's attorney failed to lodge a timely objection to the questions claimed to violate Weir's constitutional rights. The state characterizes this failure as a procedural state default, precluding a federal habeas action under the "cause and prejudice" rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

We disagree. The Kentucky state courts did not invoke their own procedural default rule when they reviewed the case on direct appeal. Since the Kentucky courts did not rely on Kentucky's contemporaneous objection rule, we likewise decline to invoke it at this time. *See Cook* v. *Bordenkircher*, 602 F. 2d 117 (6th Cir.), *cert. denied*, 449 U. S. 936 (1979).

In addition we note that while the state raised the issue before the United States Magistrate, it did not include the issue in its objections to the magistrate's report. Under these circumstances, we believe it proper to reach the merits of this appeal. *See United States* v. *Walters*, 683 F. 2d 947 (6th Cir. 1981). *See also Jenkins* v. *Anderson*, 100 S. Ct. 2124, 2127 n.1 (1980).

[2]Weir was being held upside down by Buchanan.

drove to the home of some friends. He never reported the incident to the police. Subsequently, Weir was apprehended, indicted and brought to trial.

Weir was charged with intentional murder in violation of Kentucky Revised Statute KRS 507.020(1)(a). At trial, he took the stand in his own defense. His testimony on direct examination detailed events inside the bar which led up to the fight and described the circumstances surrounding the stabbing.[3] Weir freely admitted stabbing Buchanan, but claimed that he acted in self-defense and that the stabbing was accidental. This was the first time he had offered an exculpatory story for his actions.

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[3]Well, I was shooting pool with—I didn't know him at the time and I still don't—I think it was Kenneth Turner. I was in the middle of the game when I went out on account of Owen; so, I go back in and get my cigarettes and play a half a pool game or something, you know. My wife, I think, was standing there at the door. So, I go on and shoot the rest of this game of pool, or was almost finished with it when my wife says they jumped on Owen. Well, I didn't know what was going on either, you know, so I run out the door and just go down to the end of the building. Well, I said what's going on? I was talking to my wife, and when I did I could see Owen. I couldn't see him until Ronnie Buchanan turned around. He was down further towards the end of that car, and he said I'll tell you what's happening they're all over my car. At that time my wife said well, he's a damn liar. When she said that he just come on running stronger and at the same time swinging at my wife, which she was standing right to my side and in back of me. He swung kind of past me, but I just—all I did was throw up my arm to block that and and he come around evidently with his left, because the next thing I knew I was on the ground. I remember him coming down on me and getting ahold of my legs, and he gets me up by the legs and when he picks me up, he's standing on my hair. I think you saw the pictures, it was a little longer than it is now, and he dropped me up and down. He was swinging me all around. I was half conscious about that time after beating

*(Footnote continued on following page)*

The prosecutor vigorously cross-examined Weir. He inquired into Weir's assertion that he had been seriously injured. Weir admitted that his injuries had not required medical attention. The prosecutor then turned to the issue of the knife, asking Weir how he happened to stab Buchanan and how the knife happened to disappear after the stabbing.[4] The prosecutor also questioned Weir about his

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*(Footnote continued from preceding page)*

my head on the ground a few times, and then he just comes down, I guess, to pin me or whatever; but I remember trying to get the knife out. I was trying to get up from there; I was in bad shape. He come down on me, and then he got up and I heard him say he had been stabbed. Then I got up and I was pretty dizzy. I couldn't really straighten up real good. I remember seeing him backing away, and I just tried to get my stuff together and get out of there.

I didn't know who was with who, or what. There were several people around that I didn't know—everybody but Owen. I think that she mentioned that I was chasing them up the walk or something, but I had no intention to chase anybody. I was just trying to—my truck was parked on the far end of the building and I was trying to find my wife, and I think I run across her somewhere along about the front door, and I got her and said let's go. We went on down to get in the truck and backed out going towards Paducah.

[4]Q. Well, you were upside down, as I recall what you said, and you took the knife off the pouch on your right side, you opened it up with both hands and stabbed him, right?

A. No, sir. He fell on it. When he come down on me, he come down on the knife.

Q. What did you have the knife out for then?

A. I was going to try to get him off of me.

Q. You did get him off of you; didn't you?

A. Yes.

Q. Let me ask you about that knife disappearing like it did. Where did you say you put it?

*(Footnote continued on following page)*

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*(Footnote continued from preceding page)*

A. It was evidently on the tool box on the back of the truck.

Q. Why did you put it there? Why didn't you put it back in the pouch?

A. Well, I was kind of shook up.

Q. Now, you say you took the keys out and unlocked the car; is that right?

A. Yes, sir.

Q. Why didn't you put your knife back in the pouch, if you didn't?

A. I don't know. I just laid it on the truck evidently; it was gone.

Q. Do you remember that now, or did somebody say that?

A. I distinctly remember laying it up there trying to find the keys.

Q. The next day when the State Police came to your house and searched it, why didn't you just tell them that I lost it?

A. I don't know.

Q. Why didn't you tell the State Police where the knife was?

A. I don't guess they even asked me

Q. Well, you didn't offer it, did you?

A. No.

Q. Then you took off towards Paducah heading home, right?

A. I was just leaving.

Q. Then you came back and picked up Owen and Debby, right?

A. Yes.

Q. And after some period, you did end up in Barlow, correct?

A. Yes, sir.

Q. How long did you stay there?

A. Well, we went to Barlow and we stayed all night down there until probably 10:00 o'clock the next morning.

Q. Then where did you go? Did you go to Wickliffe after that?

A. Yes, sir.

Q. What did you do in Wickliffe?

A. I stopped by a friend of mines house over there. It wasn't his house, it was his place of business. They had a grocery store and I got some sandwich meat and lunch meat.

*(Footnote continued on following page)*

*(Footnote continued from preceding page)*

Q. Who's place is that, Mr. Weir?

A. That's Bill Compton.

Q. How long were you there?

A. Oh, approximately an hour, maybe a little longer—maybe two hours.

Q. Did you talk to Bill Compton about what happened?

A. No, sir.

* * *

Q. What did you tell him you were doing?

A. I called him and just asked him if he minded if I came over.

Q. What did you tell him you were coming over there for?

A. Well, I just asked him if I could stay over at his house, and he said sure.

Q. All four of you?

Q. Why didn't you tell them at the time that he accidentally fell down on your knife?

A. Well, I didn't—

Mr. Osborne: Judge, again, I am going to object. He had no reason to tell them anything at the time.

The Court: All right.

By Mr. Bryant:

Q. Go ahead and tell us.

A. I didn't feel I ought to tell them anything.

Q. Okay. That's after your knife disappeared and after you fled all over Ballard County, Barlow, and Wickliffe; and 17 hours later you were picked up. You don't want to tell us about anything? Of course, you don't have to.

Mr. Osborne: Again, I'm going to object to that and move this Court to discharge this Jury in this case because of the conduct on cross-examination.

The Court: Overruled.

* * *

failure to report the incident to the police and disclose his exculpatory story.[5] Weir was found guilty of first degree manslaughter and his conviction was affirmed on direct appeal.

Weir then petitioned for a writ of habeas corpus claiming that the prosecutor's effort to impeach his testimony, by inquiring into and commenting upon his failure to offer the exculpatory story to the police officers at the time of his arrest, violated his constitutional rights. Citing *Doyle, supra,* and *Griffin* v. *California,* 380 U. S. 609 (1965), the district court granted the writ conditioned upon the right of the Commonwealth of Kentucky to retry Weir within 120 days. The Commonwealth has appealed.

## I. Preliminary Discussion

We can divide the questions asked by the prosecutor into two basic areas: those concerning pre-arrest silence and flight by the petitioner and those concerning post-arrest silence. Most of the prosecutor's questions dealt with pre-arrest silence. The prosecutor emphasized that the defendant did not go to the police and was not apprehended

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[5]Q. Now, Weir, after this happened, your defense intrigues me, really. It's very interesting to me. After it happened, if this is the way it happened, why didn't you go to the Police Department?

A. I didn't know, really, how bad he was hurt, or if he was hurt very bad at all. I didn't really know.

Q. All right, so he wasn't hurt very badly, why didn't you go to the Police Department?

A. Why didn't anybody else go to the Police Department? Why didn't everybody out there go to the Police Department?

Q. They did go to the Police Department, but you didn't go.

A. No.

Q. Now, you headed towards Paducah. Why were you going towards Paducah?

A. Well, I was going home, I guess. I was just going home.

for 17 hours after the stabbing. The prosecutor also grilled Weir as to what happened to the murder weapon — the knife with which Weir stabbed the victim.[6]

Thus far, there was no constitutional impropriety. In *Jenkins* v. *Anderson*, 100 S. Ct. 2124 (1980), the Supreme Court ruled that *pre-arrest* silence would be used to impeach a defendant who takes the stand. Under *Jenkins*, much of the prosecutor's examination of the defendant was proper.

The problem is that the prosecutor did not stop his questioning at petitioner's pre-arrest silence. The prosecutor went on to ask Weir why he had not disclosed the knife's location to the state police when they came to his house to arrest him. The prosecutor also asked Weir why he didn't try to give an exculpatory explanation to the state police when he was arrested.[7]

It does not appear from the record that at the time the state police went to Weir's house and arrested him, that they immediately read *Miranda* warnings to him. Thus, this case presents the threshold question whether post-arrest silence can be used to impeach a defendant, even though *Miranda* warnings were not given to him. For reasons discussed below, we conclude that a defendant cannot be so impeached.[8]

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[6]The knife was apparently never found. The defendant said he left it in back of his truck. *See* n.4, *supra*.

[7]See n.4, *supra*.

[8]The Commonwealth argues on appeal that because the record is so unclear, we should remand for an evidentiary hearing as to when *Miranda* warnings were given. Because we conclude that it makes no difference whether warnings were given or not, there is no need to remand.

## II. Impeachment on the Basis of Post-Arrest Silence

The underlying rationale for limiting impeachment because of silence is simply that "[i]n most circumstances silence is so ambiguous that it is of little probative force." *United States* v. *Hale*, 422 U. S. 171, 176 (1975). In addition,

> evidence at the time of arrest . . . also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." *Id.* at 180 (citation omitted).

*Hale*, of course, was decided under the Supreme Court's supervisory authority over federal proceedings. In *Doyle* v. *Ohio*, 426 U. S. 610 (1976) the Court extended the rationale of *United States* v. *Hale* to state cases. However, in *Doyle*, the Court was dealing with a constitutional question and its holding was limited:

> We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.

*Doyle*, supra at 619.

A key premise underlying *Doyle* was the unfairness of giving *Miranda* warnings to a defendant — which include a statement that the defendant has the right to remain silent — and then impeaching the defendant at trial with that silence. As the Court noted, "[s]ilence in the wake

of [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights." *Id.* at 617.

In a similar vein, in *Jenkins* v. *Anderson*, 100 S. Ct. 2124 (1980), the Court held that pre-arrest silence was a proper subject for cross-examination of a suspect at trial. The Court concluded that inquiry into pre-arrest silence was not unfair because "no governmental action induced petitioner to remain silent before arrest." *Jenkins, supra*, 100 S. Ct. at 2130.

There is thus a superficial logic to the position that only when a government officer actually reads *Miranda* warnings to a defendant is it unfair to impeach the defendant with his post-arrest silence. Nonetheless, we conclude that impeachment of a defendant with post-arrest silence is forbidden by the Constitution, regardless of whether *Miranda* warnings are given. *Doyle* and *Jenkins* were decided on a rationale of basic fairness. We think that it is inherently unfair to allow cross-examination concerning post-arrest silence.

First, we believe that post-arrest silence is not probative. In *Jenkins*, the Supreme Court thought that in many circumstances pre-arrest silence was probative:

> Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A Wigmore, Evidence § 1042, at 1056 (Chadbourne rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.
>
> *Id.* at 2129.

In the *Jenkins* case itself, the defendant did not come forward with his claim of self-defense until trial. The state

courts could conclude that his failure to come forward earlier was a proper ground for cross-examination.

We think that *Jenkins* should be limited to instances of pre-arrest silence. Whatever probative value silence has in a pre-arrest context, it has none in a post-arrest situation. An arrest initiates a formal series of proceedings against a defendant. The defendant stands accused of a crime. Under these circumstances fear and anxiety will lead a defendant — whether innocent or guilty — to silence. As Justice Marshall stated in *United States* v. *Hale, supra:*

> At the time of arrest and during custodial interrogation, innocent and guilty alike — perhaps particularly the innocent — may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657, 676( 1966). He may have maintained a silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.

These considerations have little force in a pre-arrest situation, before one stands accused. Arrest changes things. The fact that one has been arrested is significant and should make a difference.

There is a second important reason not to permit post-arrest silence to be used as impeachment. There is widespread knowledge in society that one who is arrested has no obligation to speak to the police and that he is entitled to consult with an attorney. The news media has widely publicized the *Miranda* case and its formal warnings requirement. Simply stated, many if not most persons under

arrest know of their right to remain silent and exercise that right. In fact, many lawyers give out the routine advice to their clients that if the client should be arrested for any reason, the client should say nothing and call the attorney. We do not think that persons who are exercising their right to remain silent should be penalized for it.

*Jenkins* and *Doyle* thought it unfair to impeach by use of silence where "governmental action induced petitioner to remain silent." *Jenkins, supra,* 100 S.Ct. at 2130. We think an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent. When one combines a suspect's fears and anxieties upon arrest with widespread knowledge of one's right to remain silent, the result is often just that — silence. Given these realities, we think it is fundamentally unfair to allow impeachment through the use of any post-arrest silence.

The facts of this case illustrate this unfairness. Petitioner Weir got into a fight with Ronald Buchanan and stabbed Buchanan to death during the fight. Petitioner fled. After some delay, the police came to his house and arrested him. The police also searched the house. When repeatedly questioned at trial as to why he didn't exculpate himself to the police, petitioner stated that "I didn't feel I ought to tell them anything."

The petitioner was absolutely correct. His best course of action was to consult with counsel and remain silent until then. He generally knew this. It was clear that petitioner would face legal problems as a result of the fight. The nature and extent of these difficulties, however, was unclear. Petitioner's silence was thus not probative of guilt. It was unfairly prejudicial for the prosecutor to pursue this matter at trial.[9]

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[9]With the exception of a cryptic dictum in *United States* v. *Caro,* 637 F. 2d 869, 876 (2d Cir. 1981), no post-*Jenkins* court has

*(Footnote continued on following page)*

## III. Some Practical Considerations

If we were to limit *Doyle* to instances where the police actually read *Miranda* warnings to a defendant, many practical problems arise.

First, it would penalize the knowledgeable defendant. As indicated above, many persons are aware of their rights and do not need to be read *Miranda* warnings. We see no

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*(Footnote continued from preceding page)*

suggested that the propriety of impeachment by use of post-arrest silence turns on whether *Miranda* warnings were given. In *United States* v. *Harrington*, 636 F. 2d 1182 (9th Cir. 1980), the court found *Doyle* v. *Ohio* error, albeit harmless, where the prosecutor impeached with post-arrest silence. There was no indication in that case that *Miranda* warnings had been given. *Accord United States* v. *Curtis*, 644 F. 2d 263 (3d Cir. 1981). (*Doyle* v. *Ohio* error, no evidence *Miranda* warnings were read.) *See also Alo* v. *Olim*, 639 F. 2d 466 (9th Cir. 1980) (*Doyle* v. *Ohio* error, post-arrest silence; *Miranda* warnings given, but no suggestion in opinion that this was controlling); *Williams* v. *Zahradnick*, 632 F. 2d 353 (4th Cir. 1980) (same).

In addition, a number of pre-*Jenkins* but post-*Doyle* decisions are in accord with our position. *United States* v. *Nunez-Rios*, 622 F. 2d 1093, 1100-01 (2d Cir. 1980); *United States ex rel. Allen* v. *Rowe*, 591 F. 2d 391 (7th Cir. 1979), *vacated and remanded for reconsideration in light of Jenkins*, ____ U. S. ____ (1980); *Bradford* v. *Stone*, 594 F. 2d 1294 (9th Cir. 1979); *Douglas* v. *Cupp*, 578 F. 2d 266, 267 (9th Cir. 1978), *cert. denied*, 439 U. S. 1081 (1979); *People* v. *Conyers*, 49 N. Y. 2d 174, 424 N.Y.S. 2d 402, 400 N. E. 2d 342 (1980), *vacated and remanded for reconsideration in light of Jenkins*, ____ U. S. ____ (1980). Unlike the dissent, we would accord no significance to a summary order of the Supreme Court vacating and remanding a case for reconsideration in light of an intervening precedent.

We finally note that our holding is in agreement with *Minor* v. *Black*, 527 F. 2d 1, 4 (6th Cir. 1975), *cert. denied*, 427 U. S. 904 (1976) and *United States* v. *Rainsom*, 411 F. 2d 1057 (6th Cir. 1969).

logic in allowing impeachment of the defendant who tells the police that he is aware of his rights to talk to his attorney, but not alowing impeachment if the police actually read the *Miranda* warnings.

Second, such a position would discourage the reading of *Miranda warnings*. By its terms, *Miranda* applies to "in custody interrogation." *Miranda* v. *Arizona*, 384 U. S. 436, 468 (1966). This means post-arrest interrogation.[10] Most police departments routinely have officers read *Miranda* warnings at the time of arrest. This help prevent difficulties which may develop if the officer and the defendant converse on the way to the police station. *See Rhode Island* v. *Innis*, 446 U. S. 291 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977). More important, this procedure ensures that the defendant is aware of his rights from the inception of the arrest. However, there is no requirement that the *Miranda* warnings be read at the time of arrest. As the Court noted in *Rhode Island* v. *Innis*, *supra* at 300, "the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."[11]

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[10] *See Beckweth* v. *United States*, 425 U. S. 341 (1976); *Orozco* v. *Texas*, 394 U. S. 324 (1969); *Mathis* v. *United States*, 391 U. S. 1 (1968).

[11] The Court thus overstated *Miranda's* requirements in *Doyle* v. *Ohio*, 426 U. S. at 610:

> Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, *see Michigan* v. *Tucker*, 417 U. S. 433, 443-444 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says

*(Footnote continued on following page)*

Thus, the police have some discretion in deciding when to read *Miranda* warnings. If we limited *Doyle* v. *Ohio* to instances where the police actually read the warnings, they could eviscerate *Doyle* through the simple expedient of not reading *Miranda* warnings at the time of arrest. The police could simply arrest a suspect and be careful not to interrogate him for 15-20 minutes. If the police wanted to question the suspect, they could then read the *Miranda* warnings. If the suspect had remained silent for those 15-20 minutes, that silence could be used for impeachment at trial. Such a result would be illogical.

## IV. Harmless Error

The state has a good argument that the improper use of post-arrest silence in this case was harmless beyond a reasonable doubt. The unlawful prosecutorial inquiry into Weir's post-arrest silence was not prolonged or emphasized. In addition, the questions paralleled questions the prosecutor properly asked about Weir's pre-arrest silence. The issue of harmless error in *Doyle* v. *Ohio* situations has come up often. We refer the reader to *Williams* v. *Zahradnick*, 632 F. 2d 353, 360-65 (4th Cir. 1980) (citing numerous cases) for an extensive discussion of this question.

In this case, we conclude that the error was not harmless beyond a reasonable doubt. We are dealing with a fight which ended in a stabbing. As can be expected, the

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*(Footnote continued from preceding page)*

might be used against him, and that he has a right to a retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insoluably ambiguous because of what the state is required to advise the person arrested.

witness' testimony is conflicting. The jury convicted Weir not of murder, but of first degree manslaughter.

Courts should be cautious in applying the harmless error doctrine. *See Eberhardt* v. *Bordenkircher,* 605 F. 2d 275, 278-80 (6th Cir. 1979). In this case, although the error was not pronounced, it may well have affected the jury's decision. The circumstances surrounding the fight and subsequent stabbing were very muddled at trial. A jury plays a particularly important fact-finding role in cases like this. A jury should have an opportunity to determine Weir's culpability without the taint of constitutional error. We conclude that the error was not harmless beyond a reasonable doubt.

## V. Conclusion

The judgment of the district court is affirmed.

LAMBROS, J., concurring.

While I concur completely in the opinion filed by Judge Keith, I wish to emphasize that we do not hold that post-arrest silence is never a proper subject of prosecutorial comment, but only that the propriety of such comment does not depend on whether or not the defendant has been read his *Miranda* warnings. Thus, for example, if a defendant testifies that he told the police an exculpatory version of the facts upon arrest, then the fact of silence may of course be used to challenge the defendant's behavior following arrest. *Doyle* v. *Ohio,* 426 U. S. 610, 619-20, n.11 (1976).

I also wish to elaborate on our finding of prejudicial error. Having held that comments of the sort complained of here are constitutionally impermissible, to find that they are nevertheless harmless would in essence encourage similar misconduct in future cases. I do not feel that we can allow prosecutors the discretion to decide that, having presented ample untainted evidence, they may make this

type of comment without jeopardizing the outcome of their case.

ENGEL, Circuit Judge, dissenting. I respectfully dissent.

In *Doyle* v. *Ohio*, 426 U. S. 610, 619 (1976), the Supreme Court held that "the use for impeachment purposes of petitioners' silence, at the time of arrest *and* after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." (Emphasis added). The majority today has misconstrued and misapplied the *Doyle* rationale in affording due process protection to Eric Weir's silence on the facts of this case. I believe the majority's view is so plainly at odds with Supreme Court authority[1] that we are foreclosed from taking such a position.

## I.

The crux of this case can most simply be described as balancing two important elements of our criminal justice system—full factual disclosure in order to ascertain the truth and due process of law. The former is indeed a crucial concern.

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

*United States* v. *Nixon*, 418 U. S. 683, 709 (1974). Likewise, prosecutorial cross-examination plays a critical role in the

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[1]See *People* v. *Conyers*, 49 N. Y. 2d 179, 400 N. E. 2d 342 (1980), *summarily vacated, New York* v. *Conyers*, 49 U.S.L.W. 3212 (October 7, 1980); *Jenkins* v. *Anderson*, ___ U. S. ___, 100 S. Ct. 2124 (1980); *Roberts* v. *United States*, 445 U. S. 552 (1980); *Harris* v. *New York*, 401 U. S. 222 (1971); and *Brown* v. *United States*, 356 U. S. 148 (1958).

development of facts and the search for truth.[2] Yet, in *Doyle* the Supreme Court found that due process barred prosecutorial inquiry into a defendant's silence at the time of his arrest.

The Supreme Court had two grounds for its *Doyle* holding, both intimately related to the fact that the police had given *Miranda* warnings to the defendants at the time of their arrest. The Court first found that once *Miranda* warnings had been given a defendant's silence became "insolubly ambiguous" thereby precluding the jury's use of such silence to discredit an exculpatory story offered at trial. In so ruling, a majority of the Court observed that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* warnings." *Doyle, supra,* 426 U. S. at 617.

Second, the Court stated that it would be "fundamentally unfair" to use a defendant's silence to impeach an explanation offered at trial, after being impliedly assured by express *Miranda* warnings that silence would carry no

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[2]In *Doyle* v. *Ohio,* 426 U. S. 610, 617 n.7, the Supreme Court stated:

> We recognize, of course, that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge.

*See also,* 426 U. S. at 628-30 and n.8 (Stevens, J., dissenting).

In *Jenkins, supra,* 100 S. Ct. at 2129 (1980) quoting *Brown* v. *United States,* 356 U. S. 148, 156 (1958), the Supreme Court stated:

> Once a defendant decides to testify "[t]he interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of the considerations determining the scope and limits of the privilege against self-incrimination."

penalty. *Id.*, at 618. Implicit in this rationale is an apparent apprehension that *Miranda* warnings could be employed, either deliberately or innocently, to induce silence which is later used to impeach the defendant at trial. Thus, express *Miranda* warnings block future inquiry into silence in order to protect an individual from the fundamental unfairness of contrived impeachment evidence.

## II.

This case does not involve the type of "fundamental unfairness" found in *Doyle*, where explicit *Miranda* warnings induced the defendant to remain silent and promised his silence would be respected.[3] There is no evidence that *Miranda* warnings were ever given to Eric Weir. Weir's arrest, without evidence of some other improper police tactics, was not in itself fundamentally unfair; the police were under no obligation to give *Miranda* warnings until they began the process of interrogation. *Rhode Island* v. *Innis*, 446 U. S. 291, 300-01 (1980). *See also People* v. *Conyers*, 49 N.Y. 2d 174, 400 N.E. 2d 342, 350 (1980) (Meyer, J., dissenting), *summarily vacated*, 49 U.S.L.W. 3212 (October 7, 1980). Nor, once Weir had taken the

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[3]In *Jenkins, supra*, 100 S. Ct. at 2130, Justice Powell, who also authored *Doyle*, stated:

> Only in *Doyle* . . . did we find that impeachment by silence violated the Constitution. In that case a defendant received the warnings required by *Miranda* . . . . In this case, no governmental action induced petitioner to remain silent befor the petitioner was taken into custody *and* given *Miranda* warnings. (Emphasis added).

And in *Anderson* v. *Charles*, ___ U. S. ___, 100 S. Ct. 2180, 2181 (1980), the Supreme Court stated, In *Doyle*, we held that the Due Process Clause prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings.

stand, was it unfair for the prosecutor to cross-examine him as to his activities after the stabbing.

> If [a defendant] takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness . . . . "[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts."

*Brown* v. *United States*, 356 U. S. 148, 154-55 (1958) (*quoting Fitzpatrick* v. *United States*, 178 U. S. 304, 315 (1900)). *See also Doyle, supra*, 426 U. S. at 625-26 (Stevens, J., dissenting).

The majority broadly asserts that because of "widespread knowledge in society" about the Fifth Amendment privilege, "many if not most persons under arrest know of their right to remain silent and exercise that right." *Ante* at p. 10. As much might as easily be said of silence before arrest, or at any other time, for that matter. This is of course inconsistent with the underlying premise of *Miranda* that most citizens do not know their constitutional rights and must be informed of them.[4] It directly contradicts the observation in *Jenkins* that "[I]n the absence of an express assertion of the privilege [against self-incrimination], the presumption is that the privilege was not exercised." *Jenkins* v. *Anderson*, ____ U. S. ____, 100 S. Ct. 2124, 2133 n.9 (1980) (Stevens, J., concurring). In *Roberts* v. *United States*, 445 U. S. 552, 559-60 (1980), the Supreme Court stated with telling clarity:

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[4] "[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda* v. *Arizona*, 384 U. S. 436, 468 (1966). Arguably, the eventual conclusion to be drawn from the majority's rationale is that *Miranda's* therapeutic rule is no longer needed.

> The Fifth Amendment privilege against compelled self-incrimination is not self-executing . . . . *Miranda's requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed* . . . . (Emphasis added).

In my view, the majority's approach here is precisely what persuaded the Supreme Court to vacate *Conyers, supra.* It invites innumerable occasions where the truth-seeking function of the criminal trial process will be impeded, without protecting an individual's constitutional rights. The price for such speculative gains is simply too great. In the words of Justice Frankfurter, it makes "of the Fifth Amendment not only a human safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." *Brown, supra,* 356 U. S. at 156. The majority points to the fact of arrest as "governmental action which implicitly induces a defendant to remain silent." *Ante* at p. 10. The fact of arrest alone, however, is no substitute for evidence of reliance on a constitutional right which is necessary to rebut the presumption, applicable in this case, "that the privilege was not exercised." *Jenkins, supra,* 100 S. Ct. at 2133 n.9.

The majority seemingly concludes that post-arrest silence has no probative value, but as Judge Lambros observes in his concurring opinion, even *Doyle* recognizes that in certain circumstances, post-arrest silence can be used to impeach a defendant. *See Doyle, supra,* 426 U. S. at 619-20 n.11. Further, Justice Stevens acknowledged that "under accepted rules of evidence, . . . [a defendant's] silence . . . [can be] tantamount to a prior inconsistent statement and admissible for purposes of impeachment." *Id.,* at 622. In *Charles* v. *Anderson,* 610 F. 2d 417, 420 (6th Cir. 1979), *rev'd per curiam,* ____ U. S. ____, 100 S. Ct. 2180 (1980),

this court recognized that post-arrest silence may sometimes be probative:

> We begin with the proposition that *Doyle* does not prohibit every impeachment use of a defendant's post-arrest silence, but only those which are fundamentally unfair.

Nor does the majority's conclusion square with the precedent upon which it purports to rely, *United States* v. *Hale*, 422 U. S. 171 (1975). In *Hale*, the defendant was arrested for robbery, taken to the police station, and given his *Miranda* warnings. However, he refused to make a statement. The defendant took the stand at his trial and offered an alibi defense. The prosecutor cross-examined the defendant regarding his post-arrest silence. In ruling on the propriety of the prosecutor's inquiry, as a matter of federal evidentiary law, the Supreme Court recognized:

> Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion.

*Id.*, at 176. The Court had previously noted, "If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." *Id.* The Court refused to find an inconsistency in *Hale* because:

> [T]he situation of an arrestee is very different, for he is under no duty to speak and, as in this case, *has ordi-*

> *narily been advised by government authorities only moments earlier that he has the right to remain silent.* . . .

*Id.* (emphasis added). Unlike the situation in *Hale*, Weir was not advised of this right.

It is indeed difficult to discern why as a practical matter, the precise moment of arrest must automatically make any silence lose all probity of the truth of a defendant's exculpatory story. While *Doyle* holds that the administration of *Miranda* rights makes the accused's subsequent silence "insoluably ambiguous," it has always seemed to me at least that the more persuasive reason is that while the silence may still be probative, its value is diminished and at that point is outweighed by the need to protect the integrity of the promise made by the administration of the warnings.

The majority asserts that failure to extend *Doyle* will penalize those defendants who already know their constitutional rights, even without *Miranda* warnings. *Ante*, at p. 11. I do not view the rule as a penalty; it simply fails to provide a shield because there is no adequate reason for it. If the defendant elects to testify, he may still explain that his silence was premised on the exercise of the right. That is not a shocking confession of guilt; indeed many jurors may well be in complete sympathy with such conduct and find it utterly logical. It is basically no different from any other fact concerning which he may testify. I see no harm in letting the jury weigh that circumstance with all the others.

The same logic also dispels the notion that the police may deliberately withhold *Miranda* warnings so as to preserve the opportunity to use silence for impeachment purposes. Perhaps so, but if they do, it may be at the risk of a good opportunity to get a valid confession, and their well

laid plans, assuming they are astute enough to formulate them, will be frustrated if the accused never takes the stand. Most state courts have the same power to prohibit such inquiry as is vested in federal courts by Rule 403 of the Federal Rules of Evidence;[5] if not, the defendant always has the therapeutic safeguard of explaining his silence on the stand. In any case, the Supreme Court has noted:

> The impeachment process . . . undoubtedly provide[s] valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.

*Harris* v. *New York,* 401 U. S. 222, 225 (1971).

The majority's approach here is strikingly similar to the rationale articulated by the majority in *Conyers, supra.* I subscribe generally to the view expressed by Judge Meyer in his dissent in that case. The *per se* rule articulated today by the majority was rejected by the Supreme Court when it summarily vacated the state court's decision in

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[5]Such relief in federal prosecutions is specifically afforded by Federal Rule of Evidence 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Particular circumstances may require, as a matter of fundamental fairness and hence of due process that evidence of a defendant's post-arrest silence be excluded. It is necessary for our purposes here, however, only to observe that the fact of arrest itself does not trigger the fundamental fairness bar.

*Conyers*. It has been rejected primarily because it places an unjustified and unnecessary burden upon the truth-seeking process.

Even if I were to agree with the majority's view, I would conceive myself obliged to reverse, noting my obedience to the prevailing Supreme Court authority while expressing by disagreement with it. I see nothing wrong with such an approach. This is how the law moves. This in my view would have been a far more appropriate response than that made by the majority today.

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. C79-0149-P(J)

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ERIC WEIR, - - - - - - - - - *Petitioner*

*v.*

LLOYD FLETCHER, Superintendent, Bell County Forestry Camp, - - - - - - *Respondent*

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## FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDATIONS

This matter coming before the court on proceedings filed pursuant to 28 U.S.C. 2254; upon a conviction and judgment exacted by the McCracken Circuit Court on the 8th of March, 1978; it appearing that the petitioner was granted leave to proceed herein in forma pauperis and his petition was filed on the 21st of August, 1979; it appearing that the respondent filed his Answer with all exhibits required by Rule 5 of the Rules Governing Section 2254 Proceedings; the Court having referred this matter to the undersigned Magistrate pursuant to 28 U.S.C. Section 636(b) and Rule 8 of the above-mentioned Rules; the undersigned having considered the record as a whole, makes the following proposed findings and recommendations to the Court.

1. The petitioner was convicted on the 8th of March, 1978, of manslaughter in the first degree and sentenced to imprisonment for twenty years. The conviction arose from the stabbing death of Ronald Buchanan.

2. At the two-day jury trial, testimony was heard from all witnesses presented by the Commonwealth and the defendant, through his counsel, Earl Osborne.

3. The undisputed facts reveal that the petitioner and the victim were engaged in an affray in the parking lot of Sea Breeze Night Club in McCracken County, Kentucky, on or about the 25th of September, 1977. Immediately prior to the stabbing, the victim was holding the petitioner in an upsidedown position. The petitioner took a knife from a pouch on his belt and stabbed the victim. The victim later died from the stab wound to his liver. The petitioner was arrested at his mobile home the following afternoon.

4. The magistrate does not make a determination of credibility on the facts disputed by various witnesses as that is within the perview of the trial jury.

5. During the prosecutor's examination of the petitioner, the following colloquies occurred:

"Q. The next day when the State Police came to your house and searched it, why didn't you just tell them that I lost it?

A. I don't know.

. . .

Q. Why didn't you tell the State Police where the knife was?

A. I don't guess they even asked me.

Q. Well, you didn't offer it did you?

A. No.

Q. Why didn't you tell them at the time that he accidentally fell down on your knife?

A. Well, I didn't—

Mr. Osborne: Judge, again, I am going to object. He had no reason to tell them anything at the time.

The Court: He can ask him, Mr. Osborne, it's overruled.

By Mr. Bryant:

Q. Go ahead and tell us.

A. I didn't feel I ought to tell them anything.

Q. Okay. That's after your knife disappeared and after you fled all over Ballard County, Barlow, and Wickliffe; and 17 hours later you were picked up. You don't want to tell us about anything? Of course, you don't have to.

Mr. Osborne: Again, I'm going to object to that and move this Court to discharge this Jury in this case because of the conduct on cross-examination.

The Court: Overruled." (T.E., pp. 234, 235-236).

* * * * * * *

"Q. Well, you were upside down, as I recall what you said, and you took the knife off the pouch on your right side, you opened it up with both hands and stabbed him, right?

A. No sir. He fell on it. When he come down on me, he come down on the knife.

Q. What did you have the knife out for then?

A. I was going to try to get him off of me.

Q. You did get him off of you; didn't you?

A. Yes.

Q. Now, Weir, after this happened, your defense intrigues me, really. It's very interesting to me. After it happened, if this is the way it happened, why didn't you go to the Police Department?

A. I didn't know, really, how bad he was hurt, or if he was hurt very bad at all. I didn't really know.

Q. All right, so he wasn't hurt very badly, why didn't you go to the Police Department?

A. Why didn't anybody else go to the Police Department? Why didn't everybody out there go to the Police Department?

Q. They did go to the Police Department, but you didn't go.

A. No." (T.E., pp. 227-228).

6. Subsequent to his conviction, the petitioner filed notice of his intention to appeal on the 14th of March, 1978. As grounds for appeal, the petitioner argued 1) that his failure to offer exculpatory evidence at the time of his arrest was disclosed to the jury for impeachment purposes in violation of his right to Due Process as guaranteed by the 5th and 14th Amendments to the Constitution, and 2) irrelevant testimony was admitted at trial; all of which substantially prejudiced petitioner. The Supreme Court affirmed the conviction on both grounds in an unpublished opinion.

7. The petitioner brings this habeas corpus proceeding raising only one issue, to-wit: That the prosecutor's comments before the jury for impeachment purposes concerning the petitioner's failure to make exclupatory statements to officers at the time of his arrest violated his constitutional rights to Due Process as guaranteed by the 5th and 14th Amendments to the U.S. Constitution.

## CONCLUSIONS OF LAW

The undersigned having made the foregoing Findings of Fact, and having considered the record as a whole, makes the following Conclusions of Law:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 USC 2241 and 2254. The petition complies with the venue requirement of Rule 3 of the local rules.

2. The petitioner has exhausted his remedies available in the courts of Kentucky as required by 28 USC 2254(b).

3. References by the prosecutor to the petitioner's silence at the time of his arrest in the colloquy first quoted in Finding 3 above, violated the petitioner's right to Due Process as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

## AUTHORITY

The Supreme Court of the United States in *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966), held that upon arrest, an accused has the constitutional right to remain silent as guaranteed pursuant to the Fifth Amendment of the Constitution.

One year earlier, the Court, in *Griffin* v. *State of California,* 380 U. S. 609, 85 S. Ct. 1229 (1965), applied the self-incrimination clause of the Fifth Amendment to the State through the Fourteenth Amendment. The cited case involved comments by the trial judge and prosecutor concerning the accused's failure to testify in his own behalf at trial. The Court determined that to allow comment to the jury on the accused's decision not to testify, "is a penalty imposed by courts for exercising a constitutional privilege."

In *Doyle* v. *Ohio,* 426 U. S. 610, 96 S. Ct. 2240, 48 L. Ed. 2d 91 (1976), the Supreme Court held that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment. In the case at bar, in an obvious attempt to impeach the direct testimony of the petitioner at trial; the prosecutor asked the petitioner through at least three questions (quoted in the colloquy first mentioned in Finding of Fact 3 above) why he did not present his exculpatory evidence at the time of his arrest by the Kentucky State Police instead of waiting until trial to present his side of the story.

Perhaps at first impression, it may be thought that the case at bar is distinguishable from *Doyle* in that the latter suggested, by its language, that an advising of *Miranda* warnings would be a prerequisite to the petitioner's having the right to expect that his silence would not be used at trial for impeachment purposes. We can not find in the record whether or not the petitioner was advised of his *Miranda* rights at the time of his arrest. The arresting officer, Trooper James Stevens, stated in response to the prosecution's question concerning petitioner's arrest, "Well, we took him into custody, and I advised him of the charge." and, "We did everything but read the warrant to him." (T.E., pp. 197-198). One may or may not assume that "everything" includes an advisement of *Miranda* rights. Whether or not the petitioner was advised of his *Miranda* rights at the time of his arrest, he was entitled to their protection at the time of his arrest.

It should next be determined whether or not the petitioner's "silence" at the time of his arrest was intended as an exercise of his Fifth Amendment rights. In answer to the prosecutor's question concerning why the petitioner did not tell the arresting officer that the victim fell on the knife, the petitioner stated that, "I didn't feel that I ought to tell them anything." The undersigned sees this as reflecting the petitioner's feeling that any kind of statement made by him could be damaging to his defense. Even if the petitioner was not formally advised of his right to silence, he apparently was aware of this Constitutional privilege and availed himself of it. In *Miranda, supra,* the Supreme Court stated:

> ". . . it is impermissible to penalize an individual for exercising his Fifth Amendment privilege . . . . The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

4. The violation of the petitioner's Fifth Amendment privilege was not harmless error.

## AUTHORITY

It appears that neither the Supreme Court nor the Sixth Circuit Court has established guidelines for making a determination of harmless error. The Sixth Circuit Court of Appeals, in the most general of terms, in *Minor* v. *Black,* 527 F. 2d 1 (C.A. 6) (1975), cert. den., 427 U. S. 904, 96 S. Ct. 3189, 49 L. Ed. 2d 1198 (1976), stated that to find harmless error beyond a reasonable doubt the Court would have to determine that absent the objectionable references to the petitioner's silence prior to trial that no juror could have entertained a reasonable doubt as to his guilt. The Supreme Court in *Chapman* v. *California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, reh. den. 386 U. S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241, defined the harmless error test as being, "Whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." In further defining "harmless error", the Court of Appeals for the Sixth Circuit stated in *Eberhardt* v. *Bordenkircher,* 605 F. 2d 275 (1979):

> "Harmless error, in the context of a violation of a constitutional right of a defendant, is an extremely narrow standard, permitting the State to avoid the retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant."

In *Chapman* v. *United States,* 547 F. 2d 1240 (CA 5, 1977), cert. den., 431 U. S. 908, 97 S. Ct. 1705, 52 L. Ed. 2d 393 (1977) and *United States* v. *Meneses-Devile,* 580 F. 2d 888 (CA 5, 1977) the Court determined that whether or not

the prosecutor's comments were harmless error was to be decided on a case by case basis and for purposes of analysis divided cases into three categories as follows:

> "(1) When the prosecution used defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous.
>
> (2) When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, *i.e.*, when the prosecutor elicits that fact on direct examination and refrains from commenting on it or averting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.
>
> (3) When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error."

In the case at bar, the utterances of the prosecutor revealed by the colloquy first mentioned in Finding of Fact 3 above, clearly falls within category 1. The undersigned, after having considered the record as a whole, asserts that an application of the facts in this case to the tests herein results in an unmistakable determination that the error caused by the prosecutor's statements were prejudicial. The undersigned, conversely, rejects the respondent's assertion that the error, if any, was harmless.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusion of Law, the Magistrate recommends as follows:

1. That the petition for a writ of habeas corpus be sustained conditionally.

2. The petitioner should be granted a new trial and that scheduling of the trial shall be accomplished within 60 days of entry of this Court's Order. If the trial is not so scheduled within the 60-day period, the writ of habeas corpus should be issued.

(s) W. David King
U.S. Magistrate

Pursuant to Title 28, U.S. Code, Section 636, Rule 8 of the Rules Governing Section 2254 Procedures, and Rule 6(c) of the Rules of Civil Procedure; the parties shall have thirteen days from the date hereof to file written objections to the foregoing report with the Clerk of the Court. Extra copies shall be delivered to the chambers of The Honorable Edward H. Johnstone, U. S. District Judge, and to the undersigned at P.O. Box 826, Paducah, Kentucky.

Dated:

(s) W. David King
U.S. Magistrate

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

**No. C79-0149-P(J)**

---

ERIC WEIR - - - - - - - - - *Petitioner*

*v.*

LLOYD FLETCHER, Superintendent, Bell County Forestry Camp - - - - - - *Respondent*

---

**ORDER & JUDGMENT**—Entered December 7, 1979

This matter having been referred to the U.S. Magistrate W. David King by Order dated 29th of October, 1979; it appearing that the Magistrate has filed his report pursuant to the above Order and that the respondent has filed written objections to the Magistrate's report; the Court having considered *de novo* those portions of the Magistrate's report to which objection is made by the respondent; the Court having determined that the Magistrate's report should be accepted in whole and the Findings of Fact and Conclusions of Law be fully incorporated by reference herein; and the Court being sufficiently advised:

It is hereby ORDERED and ADJUDGED that:

1. The petition for Writ of Habeas Corpus is GRANTED conditioned upon the right of the Commonwealth of Kentucky to retry the petitioner. The trial date shall be assigned within 60 days of this Order with the trial being held within a reasonable time thereafter not to exceed 60 days.

2. Failure of the Commonwealth to assign a date for the new trial or to try the petitioner within the time periods defined herein shall result in the issuance of the Writ of Habeas Corpus prayed for by the Petitioner.

This is a final and appealable order and there is no just cause for delay.

Date: December 7, 1979

(s) Edward H. Johnstone, Judge
U. S. District Court

RENDERED: FEBRUARY 27, 1979

# SUPREME COURT OF KENTUCKY

**78-SC-430-MR**

---

ERIC "MOOSE" WEIR - - - - - *Appellant*

*v.*

COMMONWEALTH OF KENTUCKY - - - *Appellee*

---

*Appeal From McCracken Circuit Court*
*Honorable Lloyd C. Emery, II, Judge*
*Indictment No. 77-225*

---

## MEMORANDUM OPINION PER CURIAM—AFFIRMING

Appellant was convicted of first-degree manslaughter and sentenced to twenty years in prison for the stabbing death of Ronnie Buchanan. The defense claimed self-defense or accident.

Appellant first asserts that a series of questions by the prosecutor improperly impeached the appellant by use of his post-arrest silence. But the violation sounds more serious than it was in reality. Defense counsel only objected to this one question: "Why didn't you tell them at the time that he accidentally fell down on your knife?" No further attention was drawn to the fact of his silence, either by questions or in closing argument, except for one fleeting reference to his not having gone to the police. Previous questions were asked the appellant regarding his prearrest failure to obtain medical aid for the alleged head injury

inflicted upon him by Buchanan or to report the incident to the police instead of going to a friend's house in another town to spend the night. Under the circumstances of this case, one isolated question constitutes "only harmless error which does not require reversal." *Darnell* v. *Commonwealth,* Ky., 558 S. W. 2d 590, 593 (1977). We hold the error is harmless beyond a reasonable doubt.

Appellant's second assignment of error claims prejudice from the testimony of Buchanan's wife on certain irrelevant matters when she testified that she and her husband were celebrating her birthday, the fact that she was pregnant on the night he was stabbed, and Buchanan had a good job and had just bought a new car (which was one of the subjects of argument between him and appellant). Counsel for the appellee best answered this argument in his brief by noting, "None of the evidence approaches the extremes found in appellant's authority, such as pregnancy and childbirth arising out of rape, *Romans* v. *Commonwealth,* Ky., 547 S. W. 2d 128 (1977), or the marital infidelity of the accused, *Pruitt* v. *Commonwealth,* Ky., 487 S. W. 2d 940 (1972)."

The judgment is affirmed.

All concur except Clayton, J., who did not sit.

# Opposition

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NO. 81-1049

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

LLOYD FLETCHER, SUPERINTENDENT,
BELL COUNTY FORESTRY CAMP,
PETITIONER,

v.

ERIC WEIR,
RESPONDENT,

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

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Counsel for Respondent

January 25, 1982

## QUESTIONS PRESENTED

I.

DID THE UNITED STATES COURT OF APPEALS, IN AFFIRMING THE DISTRICT COURT'S JUDGMENT THAT THE STATE VIOLATED WEIR'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, CORRECTLY REJECT THE STATE'S CONTENTION THAT WEIR HAD NO RIGHT TO REMAIN SILENT NOR THE ACCOMPANYING RIGHT NOT TO HAVE HIS POST-ARREST SILENCE LATER USED FOR IMPEACHMENT PURPOSES?

II.

DID THE UNITED STATES COURT OF APPEALS ERR IN HOLDING THAT THE PROSECUTOR'S CONSTITUTIONALLY PROHIBITED CROSS-EXAMINATION CONCERNING WEIR'S POST-ARREST SILENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT?

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I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S JUDGMENT THAT THE PROSECUTOR'S CROSS-EXAMINATION CONCERNING WEIR'S POST-ARREST SILENCE VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS..... 7-10

II. THE SIXTH CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD AND CORRECTLY HELD THAT THE PROSECUTOR'S CONSTITUTIONALLY PROHIBITED CROSS-EXAMINATION CONCERNING WEIR'S POST-ARREST SILENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT WHERE THE PROSECUTOR'S QUESTIONS WERE A DELIBERATE AND DIRECT ATTACK THAT STRUCK AT THE HEART OF WEIR'S CONSISTENT AND CREDIBLE DEFENSE, WHERE NO CURATIVE INSTRUCTION WAS GIVEN BY THE TRIAL JUDGE, AND WHERE THE PROSECUTOR'S EVIDENCE WAS FAR FROM OVERWHELMING AND WAS GREATLY DISPUTED..... 11-15

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NO. 81-1049

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LLOYD FLETCHER, SUPERINTENDENT
BELL COUNTY FORESTRY CAMP — PETITIONER

VS.

ERIC WEIR — RESPONDENT

---

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

---

Respondent, Eric Weir, respectfully prays that a writ of certiorari not issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on September 9, 1981.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part, provides:

> No person shall...be compelled in any criminal case to be a witness against himself....

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part, provides:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law....

## COUNTERSTATEMENT OF THE CASE

### A.

### PROCEDURAL HISTORY

On October 12, 1977, Eric Weir, the respondent, was indicted in the McCracken Circuit Court for the offense of intentional murder in violation of KRS 507.020(1)(a) [Indictment No. 77-225]. On October 27, 1977, Weir was arraigned and entered a plea of not guilty [Transcript of State Record, hereinafter TR, 7].

Weir's trial was held on February 21-23, 1978 [Transcript of State Evidence, hereinafter TE, 2]. The jury found Weir guilty of first degree manslaughter and sentenced him to twenty years imprisonment [Joint Appendix in Sixth Circuit, hereinafter JA, 83-86]. Final judgment was entered on March 8, 1978 [Id.].

Weir appealed to the Supreme Court of Kentucky, which affirmed his conviction on February 27, 1979. Weir v. Commonwealth, Memorandum Opinion Per Curium (File No. 78-SC-430-MR) [Appendix to Petition for Writ of Certiorari, hereinafter A, 63-64)]. Weir filed a petition for writ of habeas corpus and supporting memorandum in the United States District Court on August 21, 1979 [JA 93-117]. The magistrate's report and recommendation was filed on November 5, 1979 and urged that the petition be sustained based on his findings that the prosecutor's reference to Weir's post-arrest silence violated his rights under the Fifth and Fourteenth Amendments and that the error could not be construed as harmless [A 52-60]. On December 7, 1979, after a de novo review of those portions of the magistrate's report to which the then-respondent Fletcher objected [see JA 141-145], the District Court held that the magistrate's report should be accepted in whole and incorporated by reference into the order granting the petition for writ of habeas corpus conditioned upon the right of the Commonwealth to retry Weir within 120 days [A 61-62].

The State appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit which, on September 9, 1981, affirmed the judgment of the District Court [A 27-51].

B.

STATEMENT OF THE FACTS

The first prosecution witness was Linda Buchanan, the decedent's wife, who testified that she and her husband, Ronnie, were at Tooney's Sea Breeze on the night of September 24, 1977 [TE 38]. They were finishing a game of pool at closing time when Linda noticed that Debby Beckham and Vicky Weir were fighting in the parking lot [TE 49]. When Linda and Ronnie left the building there were people around their new car and Owen Beckham, who looked like he had been in a fight, was laying against the car [TE 50]. Ronnie told Owen to get off his car and Owen complied [Id.]. Linda, who was at the back of the car, heard Ronnie and Vicky Weir arguing and returned to the front of the car where she found Ronnie and Eric Weir fighting [Id.]. Ronnie was kneeling on the ground and holding Weir upside down with his head just above the ground [TE 50-51, 73]. Then Ronnie jumped up and said he had been stabbed [JA 1]. Linda did not see Weir with a knife [TE 60]. After unsuccessfully trying to get back inside the Sea Breeze, Linda and Ronnie proceeded to the hospital where Ronnie died on the following afternoon [TE 51, 55].

Charles Kenneth Turner testified that he and Weir were finishing a game of pool at closing time when Weir's wife came in and told him that "they were beating Owen again" [JA 3]. Weir went outside and Turner stood by a window, "tip-toeing, looking out" [JA 4]. According to Turner, there seemed to be an argument between Ronnie Buchanan and Weir [Id.]. The two men were grabbing each other and went to the ground [Id.]. Then Ronnie came up and had Weir by the feet until Ronnie grabbed his side [Id.]. When Turner left the Sea Breeze, Linda and Ronnie were gone and he saw Weir's truck leaving [JA 5]. Weir backed up his truck, got out and asked Turner what the hell he wanted [Id.]. Turner told him he didn't want anything and went behind the truck

and got the license number [Id.]. Turner testified that looking out the window at the Sea Breeze he "couldn't see nothing but just a little bit" while Ronnie and Weir were on the ground, but he could see most of them when they stood up [JA 6-7]. Turner saw no knife during the fight [TE 105].

Leslie Wyman testified that as he and his wife, Kathy, were leaving the Sea Breeze he noticed that his brother, Joe, was "in a scuffle" in the parking lot [JA 14]. Weir came out and asked Leslie if he wanted to fight and Leslie put up his fists [Id.]. Kathy got between the two men and told Weir to leave her husband alone [Id.]. Then Kathy and Vicky Weir then got in a fight [Id.]. Shortly after this, Ronnie Buchanan came out and told some people to get off his car [Id.]. Joe Wyman and Owen Beckham got off the car but Debby Beckham and Vicky Weir didn't move [JA 14-15]. Then Ronnie and Weir began arguing and got into a scuffle [JA 15]. Ronnie had Weir upside down by the waist and was hitting Weir with his fists [Id.]. The two men tumbled over and Ronnie raised up and said he had been stabbed [Id.].

Marvin Gifford testified that when he and his wife left the Sea Breeze to get in their truck, Joe Wyman and Owen Beckham were not really fighting but "just more or less had the other one held" [JA 18]. Marvin and his wife got out of their truck when they saw that Kathy Wyman and Vicky Weir were fighting [Id.]. When Kathy's blouse was torn off during the fight, Marvin gave his shirt to his wife to give to Kathy [JA 19]. Marvin was talking to people and not paying attention to the various fights when he heard a man say he had been stabbed [Id.]. Weir walked by Marvin with a knife in his hand [JA 19-20]. Marvin stated that he never saw the fight between Ronnie Buchanan and Weir [JA 20]. He saw Weir and his wife leave in their truck, return, pick up Owen Beckham and his wife, and leave again [TE 183]. According to Marvin, when Weir returned to the parking lot in his truck Vicky Weir "was hollering come on Owen, Moose has stabbed him" [Id.].

Jerry Gifford testified that as he was leaving the Sea Breeze he heard Ronnie Buchanan say that he had been stabbed [JA 22]. Jerry walked out into the parking lot and saw Weir standing there with a knife in his hand [Id.].

James Stevens, a Kentucky State Trooper, testified that he advised Weir of the charge and took him into custody at Weir's trailer on September 25 [JA 24-26]. Stevens stated that he didn't notice any bruises on Weir's head, but that he did not examine him [JA 25]. Weir did complain to Stevens about his wrist [Id.]. Stevens testified that when he took Weir into custody, he did everything but read the arrest warrant to him [JA 27].

The final prosecution witness was Dr. C. K. Davis who testified that Ronnie Buchanan had a single stab wound which penetrated his liver [TE 250]. Ronnie's death was due to the extensive hemorrhaging which resulted from his blood's inability to clot [TE 252].

Weir took the stand in his own defense and testified that he and his wife arrived at Tooney's Sea Breeze around 10:00 on the night of September 24 [JA 32]. Owen Beckham pulled into the parking lot on his motorcycle at about the same time [JA 33]. Once inside, they talked and shot pool [JA 34]. Weir's wife and Debby Beckham went outside to talk [JA 35]. Shortly after that, Joe Wyman and then Owen Beckham also went outside [Id.]. Vicky came in and told Weir that Owen was in a fight so he went outside and found Owen holding Joe down on the ground [Id.]. Joe's brother, Leslie, was hollering "let him up or hit him" and Weir told him to stay out of it [JA 36]. Leslie's wife got in between Weir and her husband which caused Vicky Weir to start fighting with her [Id.].

Weir went back inside to finish a game of pool with Kenneth Turner [JA 37]. Vicky told him "they jumped on Owen" again so Weir went out and asked what was going on [Id.]. Ronnie Buchanan told him "I'll tell you what's happening; they're all over my car," and Vicky said, "He's a damn liar" [Id.]. Then Ronnie swung at Vicky, and Weir blocked the blow with his arm [JA

37, 38]. Ronnie knocked Weir to the ground, picked him up by the legs and held him upside down while stepping on his hair [JA 38]. Ronnie dropped Weir up and down and swung him around [Id.]. Weir was "half conscious" and tried to get his knife out [Id.]. Ronnie "come down on" Weir and then got up saying he had been stabbed [Id.]. Weir got up but was "pretty dizzy" [Id.]. He found Vicky and they started toward Paducah in their truck but came back because Vicky had forgotten her purse [JA 39]. They retreived the purse and then a guy holding a cue stick like a weapon ran out the door afater them [JA 39-40]. Weir turned and told the guy to "come on" and that stopped him from doing anything [JA 40]. Then Weir picked up Owen Beckham and his wife, Debby, and left [JA 41].

Weir said he no longer had the knife because he set it on the truck while he looked for his keys and it apparently slid off the truck when they left [JA 42]. Weir testified that he did not hit or strike at Ronnie with the knife, but that Ronnie came down on it when he tried to pin Weir [JA 44]. During cross-examination the prosecutor was allowed, over defense objection, to ask Weir why, when the state police took him into custody, he didn't tell them what happened to the knife or that Ronnie accidently fell down on the knife [JA 59-60]. Weir testified that he didn't feel he ought to tell them anything [JA 60].

Owen Beckham testified that near closing time Vicky Weir came inside and told him that Joe Wyman was pulling Debby Beckham's hair [TE 266-267]. Owen went outside and got in a fight with Joe [TE 267]. He had Joe down on the ground when someone hit him and caused him to turn a complete flip in the air [Id.]. He landed on Ronnie Buchanan's car and Ronnie asked him what he was doing on the car [Id.]. Then Ronnie turned towards Weir, they began fighting and Owen heard someone say they had been stabbed [Id.]. Owen was getting on his motorcycle to leave when Weir pulled up and asked him to get in his truck [Id.].

Vicky Weir, Weir's wife, testified that she and Debby Beckham were sitting on Buchanan's car and talking when Joe Wyman came outside [TE 287]. He grabbed Debby by the hair and told her

that she was going with him [Id.]. Vicky went inside and got Owen who came out and got "into a scuffle" [Id.]. When Vicky came back out, Owen was sitting on top of Joe, and Leslie Wyman was "standing there cussing" [TE 287-288]. Weir told Leslie to stay out of it [Id.]. Vicky got into a fight with Leslie's wife, Kathy, after which Weir went back inside [TE 288]. Vicky said she saw Ronnie Buchanan come out and kick Owen off Joe so she ran inside to get her husband [TE 288-289]. Weir asked what was going on and Ronnie told him they had been on his car [Id.]. Vicky said Ronnie was a "damn liar" and he "threw a punch" between Vicky and Weir [TE 290]. Then Ronnie and Weir were on the ground and Ronnie was holding Weir by the legs, beating his head against the pavement [Id.]. Vicky ran to get Tooney to break up the fight but she couldn't get back into the building [Id.]. Weir found her and they left in their truck [TE 291]. They had to come back for her purse and glasses, and also picked up Owen who was having trouble starting his motorcycle [Id.].

At the close of the evidence, the trial court istructed the jury on the offenses of wanton murder, first degree manslaughter, second degree manslaughter, and reckless homicide [TR 11a-11f]. The jury found Weir guilty of first degree manslaughter and sentenced him to twenty years imprisonment [TR 10-11].

## REASONS FOR DENYING THE WRIT

### I.

### THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S JUDGMENT THAT THE PROSECUTOR'S CROSS-EXAMINATION CONCERNING WEIR'S POST-ARREST SILENCE VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

At the outset, it must be noted that the facts of this case do not present the "constitutionally significant question", whose review is urged by the petitioner, of whether a state prosecutor can impeach the testimony of an accused on the basis of his post-arrest silence where no Miranda rights[1] have been given. It simply is impossible to make a definitive determination of whether or not Weir was advised of his Miranda rights at the time of his arrest from the record in this case.[2] Nothing in the record suggests that Weir did not receive Miranda warnings from the arresting officers. In fact, the record, as well as the presumption of regularity, tends to suggest that Weir probably was advised of his Miranda rights when arrested.[3]

Thus, even if the petitioner had a legitimate basis for contending that unless and until Miranda warnings are administered an accused has no right to remain silent at the time of arrest nor the accompanying right not to have that post-arrest silence later used for impaechment purposes, this case simply

---

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2]It was only after two years of appellate proceedings in both state and federal court that the petitioner contended for the first time in the Sixth Circuit that this issue should turn on the fact of whether or not Weir was given his Miranda rights. In addition to never raising this issue in state court or in District Court, the petitioner failed to object to the District Court magistrate's conclusion that it was irrelevant whether Weir was advised of his Miranda rights when arrested because the determinative factor was that Weir was entitled to their protection at that time and did, in fact, then avail himself of his constitutional right to remain silent. The Sixth Circuit did not find it necessary to address Weir's argument that the petitioner had thereby waived this issue [See Dorzynski v. United States, 418 U.S. 424, 431, n.7 (1974), United States v. Walters, 638 F.2d 950 (6th Cir. 1981)] because it concluded that it made no difference whether warnings were given or not.

[3]The arresting officer testified that when he took Weir into custody he "advised him of the charge" and "did everything but read the [arrest] warrant to him" [JA 26-27].

does not provide the factual framework needed to resolve that legal issue. It would be improvident and non-productive for this Court to grant review in this case where the record is not sufficiently clear and specific on relevant factors to permit a decision of the issue urged by the petitioner. Massachusetts v. Painten, 389 U.S. 560 (1968); Johnson v. Massachusetts, 390 U.S. 511 (1968).

In addition to the foregoing problem, review should not be granted in this case because the decision of the Sixth Circuit is well-founded and not in conflict with the decisions of this Court or with other state or federal courts of appeal.

The petitioner makes much ado about the "considerable disarray" that he contends exists among the state and federal courts of appeal on the question of whether comments on post-arrest silence are constitutionally prohibited where Miranda warnings were not given or where, as in the case at bar, it is unclear if they were given. The petitioner is unable, however, to cite a single state or federal court of appeals case that conflicts with the Sixth Circuit's decision in the case at bar.[4]

Contrary to the vague contentions of the petitioner, the courts that have reached issues identical or similar to that dealt with by the Sixth Circuit are in accord with its position [See cases cited in n.9 of Weir v. Fletcher [A 38-39] and United States v. Curtis, 644 F.2d 263 (3rd Cir. 1981)].

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[4]The only conflicts the petitioner can point to involve issues that clearly are not factors in this case and have already been resolved by this Court, e.g., whether impeachment with pre-arrest or non-custodial silence is prohibited by the Fifth or Fourteenth Amendments [Michigan v. Hurd, Mich., 301 N.W.2d 881 (1980), vac. and remanded, 102 S.Ct. 81 (1981); United States v. Caro, 637 F.2d 869 (2nd Cir. 1981); United States ex. rel. Smith v. Rowe, 618 F.2d 1204 (7th Cir. 1979), vac. and remanded, Franzen v. Smith, 449 U.S. 810 (1980); Jenkins v. Anderson, 447 U.S. 231 (1980)], whether trial testimony can be impeached with prior inconsistent statements [Grieco v. Hall, 641 F.2d 1029 (1st Cir. 1981); United States ex. rel. Allen v. Rowe, 591 F.2d 391 (7th Cir. 1979), vac. and remanded, Franzen v. Allen, 100 S.Ct. 3006 (1980), Mishler v. Commonwealth, Ky., 556 S.W.2d 676 (1976); Charles v. Anderson, 610 F.2d 417 (6th Cir. 1978), rev., Anderson v. Charles, 447 U.S. 404 (1980)], and whether post-arrest silence can be used to impeach contention that exculpatory story given at time of arrest or trial testimony that infers cooperation with the police [United States v. Conlin, 551 F.2d 534 (2nd Cir. 1977); Stone v. Estelle, 556 F.2d 1242 (5th Cir. 1977), Anderson v. Charles, 447 U.S. 404 (1980)].

Additionally, the decision of the Sixth Circuit is consistent with and based upon prior decisions of this Court. The Sixth Circuit, in the present case, affirmed the District Court's judgment that the prosecutor's impeachment use of Weir's post-arrest silence was violative of his rights under the Fifth and Fourteenth Amendments.

This Court has twice before had the opportunity to review a lower court's determination that impeachment use of an accused's post-arrest silence violated his Fifth Amendment right to remain silent where the record did not reflect whether or not Miranda warnings were given. Review was denied in both cases. Douglass v. Cupp, 578 F.2d 266 (9th Cir. 1978), cert. den., 439 U.S. 1081 (1979) and Minor v. Black, 527 F.2d 1 (6th Cir. 1975), cert. den. 427 U.S. 904 (1976). It should be noted that the dissent in Minor v. Black, supra, unsuccessfully urged that Raffel v. United States, 271 U.S. 494 (1926) should apply to permit comment on post-arrest silence. This Court recently held in Jenkins v. Anderson, supra, that under the rule of Raffel, supra, the Fifth Amendment would not bar impeachment by pre-arrest silence. However, this Court has declined the opportunity to extend this holding to permit prosecutorial comment on an accused's post-arrest exercise of his constitutional right to remain silent. Minor v. Black, supra; Douglass v. Cupp, supra.

The Sixth Circuit's decision in this case is also in accord with this Court's holding in Doyle v. Ohio, 426 U.S. 610 (1976) and the dicta in Jenkins v. Anderson, supra, that it is fundamentally unfair to permit impeachment by use of post-arrest silence where governmental action induced the accused to remain silent. The governmental action that induced Weir's exercise of his constitutional right to remain silent included, at a minimum, his arrest and the search of his home, and possibly being advised of his Miranda rights.

Weir submits that in this post-arrest situation, even if this Court were to presume the absence of Miranda warnings, his decision to remain silent was governmentally induced and constitutionally protected. It is obvious that in arguing that

an accused person has no right to remain silent at the time of arrest unless and until the Miranda warnings are given, the petitioner has confusedly equated a mere procedural safeguard with the constitutional right that the safeguard was created to protect. The Miranda warnings are not themselves rights protected by the Constitution; rather they are measures created to provide practical reinforcement for the constitutional right against compulsory incrimination. Michigan v. Tucker, 417 U.S. 433 at 444 (1974).

The right of an accused to remain silent at arrest does not depend upon his being advised of that right, but exists by virtue of the constitutional language of the 5th Amendment to the U.S. Constitution as well as Section 11 of the Kentucky Constitution. See Clenin v. State, Wyo., 573 P.2d 844 (1978). Advice as to that right by law enforcement officers is only for the purpose of expanding its protection by assuring that the accused person is aware of it (Id.).[5] In the case at bar, it is apparent that Weir knew he was entitled, upon arrest, to the protection of the rights embodied in the Miranda warnings and that he did, in fact, avail himself of his right to remain silent at that time because he "didn't feel that [he] ought to tell them anything" [JA 59-60].

It is clear from the record that whether or not Weir was read his Miranda rights at the time of his arrest, he was entitled to their protection at that time and that he was aware of and did, in fact, exercise his constitutional right to remain silent. The Sixth Circuit properly concluded that under the facts and circumstances of this case the prosecutor's impeachment use of Weir's post-arrest silence was improper.

Accordingly, for all the above reasons, this Court should not grant review.

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[5]This Court has noted, in both United States v. Hale, 422 U.S. 171 at 177 (1975) and Doyle v. Ohio, supra at 617, n.8, that silence at the time of arrest may be inherently ambiguous even apart from the effect of Miranda warnings because of the numerous legitimate reasons, all consistent with the existence of an exculpatory explanation, for an arrested person to elect to remain silent. See also Minor v. Black, supra at 4.

II.

THE SIXTH CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD AND CORRECTLY HELD THAT THE PROSECUTOR'S CONSTITUTIONALLY PROHIBITED CROSS-EXAMINATION CONCERNIG WEIR'S POST ARREST SILENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT WHERE THE PROSECUTOR'S QUESTIONS WERE A DELIBERATE AND DIRECT ATTACK THAT STRUCK AT THE HEART OF WEIR'S CONSISTENT AND CREDIBLE DEFENSE, WHERE NO CURATIVE INSTRUCTION WAS GIVEN BY THE TRIAL JUDGE, AND WHERE THE PROSECUTOR'S EVIDENCE WAS FAR FROM OVERWHELMING AND WAS GREATLY DISPUTED.

The two lower federal courts, after carefully reviewing the particular facts and circumstances of this case, both concluded that the prosecutor's constitutionally prohibited cross-examination concerning Weir's post-arrest silence was prejudicial and not harmless beyond a reasonable doubt. The District Court, after considering the record as a whole and analyzing the facts of this case using the harmless error test as defined and applied in Chapman v. California, 386 U.S. 18 (1967), Minor v. Black, 527 F.2d 1 (6th Cir. 1975), cert. den., 427 U.S. 904 (1976), Eberhardt v. Bordenkircher, 605 F.2d 274 (6th Cir. 1979), Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), cert. den., 431 U.S. 908 (1977) and United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1977), reached the "unmistakeable determination" that the error caused by the prosecutor's cross-examination was prejudicial and not harmless [A 58-59, 61]. The Sixth Circuit Court of Appeals also applied the harmless error test from Chapman v. California, supra, referring to the discussion and analysis of this test presented in Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980) and Eberhardt v. Bordenkircher, supra. Citing the conflicting testimony by witnesses in the case at bar and the "very muddled" circumstances surrounding the fight and the subsequent stabbing, the Sixth Circuit found that the error "may well have affected the jury's decision" and stated:

> A jury plays a particularly important fact-finding role in cases like this. A jury should have an opportunity to determine Weir's culpability without the taint of constitutional error. We conclude that the error was not harmless beyond a reasonable doubt. [A 42].

Petitioner now claims that his petition for writ of certiorari should be granted because the Sixth Circuit applied an incorrect and too strict harmless error standard which it "formulated" in Eberhardt v. Bordenkircher, supra, and which conflicts with the standard promulgated by this Court in Chapman v. California, supra. This contention by the petitioner is remarkable in several respects.

Initially, it must be pointed out that the petitioner never contested the District Court's or the Sixth Circuit's use of the harmless error standard as set forth in Eberhardt v. Bordenkircher, supra. The petitioner did not even petition the Sixth Circuit for rehearing (en banc or otherwise) after it issued its decision in Weir holding that, under the standard it applied, the error was not harmless beyond a reasonable doubt. Instead, the petitioner here contends for the first time that the courts below employed the wrong harmless error standard from Eberhardt v. Bordenkircher, supra. This Court, as a general rule, will not consider contentions that were not presented to the courts below. See Dorszynski v. United States, 418 U.S. 424, 431, n.7 (1974); Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 2127, n.1 (1980); Sandstrom v. Montana, 442 U.S. 510 (1979). No exigency exists in this case to call for a deviation from this general rule.

Secondly, not only did the petitioner fail to express any disagreement in the courts below with the harmless error standard as set out in Eberhardt v. Bordenkircher, supra, he, in fact, urged as the sole contention in his objections to the District Court magistrate's report that the proper standard to be used was "the rule of Chapman v. California, [supra] and Eberhardt v. Bordenkircher, [supra] "and that under that rule he believed the prosecutor's error should be held to be harmless [JA

141-144]. Thus, the petitioner now seeks this Court's review by attacking the validity of the very harmless error standard whose use he advocated in the court below. Surely this is sandbagging at its worst. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Finally, there is, quite obviously, no conflict between the harmless error standard set forth in Chapman v. California, supra at 23-24, and the standard the Sixth Circuit described in Eberhardt v. Bordenkircher, supra at 278-280, and applied in this case. The petitioner does not even attempt to depict the nature of any such conflict but merely makes the bare assertion that one exists.

It should be apparent that the petitioner's disagreement is not with the harmless error standard used, but with the result reached by the Sixth Circuit when it applied the standard. This Court, however, does not intervene to review fact finding, especially where the findings of fact made by the district court received the concurrence of the court of appeals and there is no exceptional showing of error even alleged. United States v. Johnston, 268 U.S. 220, 227 (1925); Graver Tank and Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949).

Even if this Court were to undertake a factual review of evidence presented in this case, it would, like the District Court and Sixth Circuit, reach a finding of harmless error. The only factor weighing in favor of a possible finding of harmless error is the fact that the prosecutor's cross-examination concerning Weir's post-arrest silence was not prolonged. However, it takes only a single comment to pointedly suggest to the jury that a defendant is guilty merely because he exercised his post-arrest right to remain silent. See Douglas v. Cupp, 578 F.2d 266 (6th Cir. 1978), cert. den. 439 U.S. 1081 (1979); Eberhardt v. Bordenkircher, supra.

In the case at bar, the trial testimony indicates that in the fight between Ronnie Buchanan and Weir, Buchanan was holding Weir upside down while stepping on his hair, swinging him around, beating his head against the pavement and hitting him with his fists [JA 38, 15, see also TE 50, 73, 290]. Under these

circumstances, Weir removed a jack knife from his belt pouch in order to defend himself [JA 38, 51]. As Weir was opening the knife, Buchanan came down on him in an effort to pin him to the ground and accidently fell on the knife [JA 38, 44, 51].

On cross-examination, the prosecutor advised Weir that "your defense intrigues me, really," and proceeded to strike at the heart of Weir's defense by focusing on his failure to offer this exculpatory evidence to the state police when they arrested him at his home on the day after the fight [JA 59-60]. It is apparent from the record that the prosecutor calculated his remarks to suggest that Weir's defense of accident was merely a recent fabrication and to create in the jurors' minds an inference of guilt based solely on Weir's election to remain silent[6]. The prosecutor's questions were a deliberate and direct attack that struck at the very heart of Weir's defense.

While the prosecution's case perhaps may have been sufficient to permit a jury to find Weir guilty of some offense, it was far from overwhelming and it certainly was not undisputed[7]. In fact, the evidence for the defense was just as strong as the case for the prosecution. Weir's defense cannot possibly be described as implausible. It was reasonable, consistent and credible, and might well have been accepted by a reasonable juror, absent the prosecutor's improper impeachment use of Weir's post-arrest silence. Significantly, in this case, the trial court gave no curative instruction to the jury which

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[6]The petitioner's reliance on Stone v. Estelle, 556 F.2d 1242 (5th Cir. 1977) is misplaced. In the case at bar, Weir never stated or inferred that he cooperated with the police or that he told the police his exculpatory version upon arrest. Thus, the prosecutor could not have been attempting to rebut such assertions or inferences. It is clear that it was the substance of Weir's exculpatory trial testimony that was the subject of the impeachment inquiry. Neither Weir's silence nor his conduct were inconsistent with his testimony that Buchana accidently fell on the knife which Weir had removed from his belt pouch in order to defend himself during their mutual affray.

[7]The petitioner's assertion that the evidence was overwhelming is simply ludicrous. The issue to be resolved by the jury in this case was not, as the petitioner suggests, whether Buchanan was wounded by Weir's knife during their fight. He clearly was. What was in dispute was the nature and circumstances of the wounding--whether Buchanan was stabbed intentionally and not in self-defense as the prosecutor charged or whether he was accidently injured during the mutual affray as Weir testified. The evidence as to this issue was very mcuh in conflict.

might have mitigated the impact of the prosecutor's suggestion that Weir was guilty simply because he exercised his right to remain silent at the time of arrest.

The Sixth Circuit clearly applied the proper standard and correctly held that the prosecutor's constitionally prohibited cross-examination concerning Weir's post-arrest silence was not harmless beyond a reasonable doubt. For the reasons delineated, this Court should not grant review.

## CONCLUSION

For the reasons stated in this Brief, respondent Eric Weir respectfully requests this Court to deny the petition for a writ of certiorari filed in this case.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

No. 81-1049

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LLOYD FLETCHER, SUPERINTENDENT,
BELL COUNTY FORESTRY CAMP — PETITIONER

vs. AMENDED NOTICE OF APPEARANCE

ERIC WEIR — RESPONDENT

* * * * * * * *

The Clerk will enter my appearance as counsel for respondent. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify undersigned counsel of action by this Court by regular mail.

DONNA BOYCE PROCTOR
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OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
(502) 564-7341

COUNSEL FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 81-1049

LLOYD FLETCHER, Superintendent,
Bell County Forestry Camp PETITIONER

vs. MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ERIC WEIR RESPONDENT

* * * * * * * * *

Pursuant to Rule 46(1) of the Rules of this Court, Eric Weir, the respondent in this action, hereby requests that he be permitted to proceed in forma pauperis before this Court and that any costs or fees and printing requirements be waived.

The respondent was permitted to proceed below as an indigent by the Supreme Court of Kentucky, the United States District Court for the Western District of Kentucky, and the United States Court of Appeals for the Sixth Circuit. The respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

DONNA BOYCE PROCTOR
ASSISTANT PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

LARRY H. MARSHALL
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COUNSEL FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 81-1049

LLOYD FLETCHER, Superintendent,
Bell County Forestry Camp — PETITIONER

vs. AFFIDAVIT

ERIC WEIR — RESPONDENT

* * * * * * * * *

I, Eric Weir, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis and for waiver of any costs or fees and printing requirements:

1. I am the respondent in the above-entitled case.

2. Although I am free pending the petitioner's appeal, I cannot, because of my very limited funds, pay or give security for the court costs and printing expenses encompassed by this proceeding and still provide myself and my dependents with the necessities of life.

3. I was permitted to proceed below as an indigent by the Supreme Court of Kentucky, the United States District Court for the Western District of Kentucky, and the United States Court of Appeals for the Sixth Circuit.

ERIC WEIR

Duly witnessed and sworn to before me, a Notary Public, this 14th day of January, 1982.

Fredricka R. Caldwell
Notary Public, State at Large

My Commission expires: 1-16-83

No. 81-1049

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LLOYD FLETCHER, SUPERINTENDENT,
BELL COUNTY FORESTRY CAMP — PETITIONER

vs.

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 28(2)

ERIC WEIR — RESPONDENT

* * * * * * * *

I, Donna Boyce Proctor, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am, along with Larry H. Marshall, counsel for respondent in the above-styled action.

3. On January 25, 1982, the attached Respondent's Brief in Opposition, Amended Notice of Appearance, Motion for Leave to Proceed In Forma Pauperis, Affidavit of Indigency, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601, with first-class postage prepaid, and properly addressed to Mr. Alexander L. Stevas, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543.

Donna Boyce Proctor

DONNA BOYCE PROCTOR
ASSISTANT PUBLIC ADVOCATE

COUNSEL FOR RESPONDENT

Duly witnessed and sworn to
before me, a Notary Public,
this 25th day of January, 1982.

Notary Public, State at Large
My Commission expires: 11-18-84